

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

HONORABLE LARRY ALAN BURNS, JUDGE PRESIDING

UNITED STATES OF AMERICA,)
)
 PLAINTIFF,) CASE NO. 07CR00329-LAB
)
 VS.)
) SAN DIEGO, CALIFORNIA
 KYLE DUSTIN FOGGO,) AUGUST 15, 2007
) 10:00 A.M.
)
 DEFENDANT.)
 _____)

REPORTER'S TRANSCRIPT

APPEARANCES:

FOR THE GOVERNMENT:

KAREN P. HEWITT, U.S. ATTORNEY
BY: PHILLIP L.B. HALPERN, ESQ.
JASON A. FORGE, ESQ.

VALERIE CHU, ESQ.
ASSISTANT U.S. ATTORNEYS
880 FRONT STREET
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-AND-

OFFICE OF GENERAL COUNSEL
CENTRAL INTELLIGENCE AGENCY
BY: JOHN L. MCPHERSON, ESQ.
CHRISTIAN RICCIARDIELLO, ESQ
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WASHINGTON, DC 20505

FOR DEFENDANT FOGGO:

AKIN GUMP STRAUSS HAUSER & FELD
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1 SAN DIEGO, CALIFORNIA - WEDNESDAY, AUGUST 15, 2007-10:00 A.M.

2 THE CLERK: NO. 1A, 07CR0329, UNITED STATES OF
3 AMERICA VERSUS KYLE DUSTIN FOGGO.

4 IF COUNSEL COULD STATE THEIR APPEARANCES FOR THE
5 RECORD, PLEASE.

6 MR. HALPERN: PHIL HALPERN, JASON FORGE, AND VALERIE
7 CHU FOR THE UNITED STATES ALONG WITH JOHN MCPHERSON AND
8 CHRISTIAN RICCIARDIELLO FROM THE CIA.

9 MR. MAC DOUGALL: GOOD MORNING, YOUR HONOR. MARK
10 MAC DOUGALL FOR DEFENDANT KYLE DUSTIN FOGGO.

11 THE COURT: GOOD MORNING.

12 THE COURT HAS RECEIVED FROM BOTH COUNSEL FOR THE CIA
13 AND COUNSEL FOR MR. FOGGO REALLY WHAT AMOUNT TO LETTER BRIEFS.
14 I READ THE EXCHANGE OF LETTERS AND E-MAILS GOING BACK TO 2006
15 AND CONTINUING ON THROUGH AUGUST OF 2007. I'VE READ THE
16 ARGUMENTS HAVING TO DO WITH WHETHER THE COURT HAS JURISDICTION
17 TO DETERMINE THE ISSUE THAT'S IN DISPUTE, AND I HAVE SOME
18 QUESTIONS ABOUT THAT ISSUE.

19 IN THE FIRST INSTANCE, MR. MAC DOUGALL, THE QUESTION
20 I HAVE HAS NOTHING TO DO WITH SUBSTANCE. IT HAS MORE TO DO
21 WITH THE PROCEDURE. I THINK IT'S APPROPRIATE THAT THE UNITED
22 STATES, THROUGH THE U.S. ATTORNEY'S OFFICE, REPRESENT THE
23 GOVERNMENT ON THIS ISSUE. I CALL IT A JURISDICTIONAL ISSUE.
24 IT'S THE ISSUE OF WHETHER YOUR RELIEF AT THIS POINT IS THROUGH
25 ME OR THROUGH THE ADMINISTRATIVE PROCEDURES ACT. I THINK

1 THAT'S A PURELY LEGAL ISSUE.

2 I'VE READ YOUR PAPERS AND THE EXXON CASE AND
3 UNDERSTAND THE ARGUMENT. IT SEEMS TO ME THE UNITED STATES
4 ATTORNEY'S OFFICE IS IN CHARGE OF THE CASE AND THAT THEY OUGHT
5 TO TAKE THE LEAD ON THAT LEGAL ISSUE. I UNDERSTAND BECAUSE OF
6 THE PROTECTIVE ORDER AND THE INSTRUCTIONS I'VE GIVEN TO CIA
7 COUNSEL NOT TO DISCLOSE THE NATURE OF THE PROFFERS TO THE U.S.
8 ATTORNEYS, THAT THAT IS A MATTER THAT CONCERNS THE COURT,
9 COURT SECURITY OFFICER, COUNSEL FOR THE CIA, AND YOU. I DON'T
10 INTEND TO GET INTO THAT IN THE PRESENCE OF THE U.S.
11 PROSECUTORS.

12 THE FIRST ISSUE THAT I NEED TO RESOLVE IS WHETHER I
13 CAN RESOLVE THIS DISPUTE, WHETHER I HAVE THE POWER AND THE
14 AUTHORITY TO RESOLVE IT, OR WHETHER YOUR RELIEF LIES THROUGH
15 THAT ADMINISTRATIVE PROCEDURES ACT.

16 DO YOU AGREE THAT THE U.S. GOVERNMENT THROUGH THE
17 U.S. ATTORNEY'S OFFICE OUGHT TO AT LEAST HANDLE THAT PORTION
18 OF THE HEARING?

19 MR. MAC DOUGALL: YOUR HONOR, THERE'S NO QUESTION
20 FACTUALLY THAT THE CIA AND THE U.S. ATTORNEY'S OFFICE ARE A
21 SINGLE PARTY HERE. IF WE'RE ABLE TO GET INTO THE EX PARTE
22 PRESENTATION, THAT'S GOING TO BE AN IMPORTANT ISSUE. THE CIA
23 IS WELL-REPRESENTED. AND OUR CONCERN, OUR FUNDAMENTAL
24 CONCERN, IS THAT THE INVESTIGATIVE WORK THAT WE'VE DONE, OUR
25 WORK PRODUCT, NOT BLEED OVER. IF THE COURT IS SUGGESTING THAT

1 THE ARGUMENT WITH RESPECT TO THE APA APPLICATION BE MADE BY
2 THE U.S. ATTORNEY'S OFFICE, I DON'T THINK WE HAVE ANY
3 OBJECTION TO THAT.

4 THE COURT: IT SEEMS TO ME THAT THEY'RE IN CHARGE OF
5 THE CRIMINAL CASE HERE. AND THE ISSUE OF WHICH THE COURT CAN
6 MAKE A DECISION ON THE MERITS ON THE CRIMINAL CASE, THAT LEGAL
7 ISSUE OUGHT TO BE ENTRUSTED TO THEM IN THE FIRST INSTANCE.
8 IT'S NOT THAT I HAVE ANY LACK OF CONFIDENCE OR FAITH IN THE
9 CIA COUNSEL'S ABILITY TO ARGUE THE POSITION. BUT IT JUST
10 SEEMS TO ME THAT THAT ISSUE BEARS MORE ON THE CRIMINAL CASE IN
11 FRONT OF ME AND HOW THAT SHOULD BE DECIDED, WHETHER BY ME OR
12 WHETHER YOU OUGHT TO BE REQUIRED TO FILE A LAWSUIT CHALLENGING
13 THE CIA'S DETERMINATION. WE CAN DO THAT, DISCUSS THAT,
14 WITHOUT ANY DISCUSSION OF THE MERITS WHATSOEVER. IT'S A
15 PURELY JURISDICTIONAL ISSUE, I THINK.

16 MR. MAC DOUGALL: I AGREE WITH THAT, YOUR HONOR.
17 AND WE'RE INDIFFERENT AS TO WHICH LAWYER ARGUES FOR THE
18 GOVERNMENT BECAUSE OUR VIEW IS THAT THEY'RE A SINGLE PARTY.
19 BUT THE THING THAT WE ARE OBSESSIVE ABOUT, THE MORE
20 COLLABORATION THERE IS BETWEEN GENERAL COUNSEL'S OFFICE OF THE
21 CIA AND THE U.S. ATTORNEY'S OFFICE, THE GREATER THE RISK.
22 THAT'S MUCH OF WHAT WE ARE TELLING THEM, WHICH TO US IS BEYOND
23 DESCRIPTION AND VALUE TO THE DEFENSE, NOT BE TRANSFERRED UP.
24 THAT'S GOING TO REQUIRE ALL OF THEM TO BE VERY CAREFUL AND WE
25 DON'T QUESTION ANYONE'S INTEGRITY. BUT THAT'S THE SOLE

1 CONCERN.

2 THE COURT: I HAVE TO TELL YOU AFTER READING THE
3 RESPONSE FROM MR. MCPHERSON, I'M CONVINCED THAT HE UNDERSTANDS
4 THAT. HE'S VERY CIRCUMSPECT, AT LEAST IN ALL OF THE
5 CORRESPONDENCE THAT I'VE READ BETWEEN YOU AND HIM AND
6 INCLUDING THE E-MAILS. SO I AGREE WITH YOU, THAT THAT IS
7 IMPORTANT IN THAT THE COURT'S ORDER IN THAT REGARD NEEDS TO BE
8 FOLLOWED VERY CAREFULLY.

9 LET ME TELL YOU, THEN, WHAT MY TENTATIVE THOUGHT IS
10 ON THAT HAVING READ THE PAPERS. I FIND MYSELF IN PARTIAL
11 AGREEMENT WITH BOTH SIDES. I AGREE WITH THE DEFENDANTS THAT
12 THE PROCESS OF GOING THROUGH -- LET ME FIND THE EXACT SPOT
13 THAT I WANT.

14 I FIND MYSELF IN AGREEMENT WITH THE DEFENDANTS THAT
15 THE PROCESS OF GOING THROUGH THE ADMINISTRATIVE PROCEDURES ACT
16 IN THIS CASE WOULD BE TEDIOUS AND TIME-CONSUMING, INCONSISTENT
17 WITH REALITY THAT THE CRIMINAL CASE IS PENDING AGAINST
18 MR. FOGGO AND MR. WILKES WHERE SPEEDY TRIAL RIGHTS, AMONG
19 OTHER RIGHTS, ARE IMPLICATED.

20 IT DOES APPEAR TO ME, UNDER THE AUTHORITY OF THE
21 EXXON CASE CITED BY THE DEFENSE, THAT I, AS THE DISTRICT COURT
22 PRESIDING OVER THE UNDERLYING CRIMINAL CASE IN WHICH THE
23 UNITED STATES IS A PARTY, DO HAVE JURISDICTION TO MAKE THE
24 CALLS. IT SEEMS SENSIBLE TO ME, TOO. IT SEEMS LOGICAL AND
25 CONSISTENT WITH THE OBLIGATIONS I HAVE UNDER CIPA ULTIMATELY

1 TO MAKE DETERMINATIONS ABOUT RELEVANCY THAT I MAKE THIS --
2 THESE TYPES OF DETERMINATIONS IN THE FIRST INSTANCE.

3 AT THE END OF THE DAY, REALLY WHAT I'M BEING ASKED
4 IS TO SECOND-GUESS THE JUDGMENT -- THE CIA'S INITIAL JUDGMENT
5 ON SOME OF THESE THINGS. THE THREE AREAS WHERE DEFENSE HAS
6 REQUESTED INFORMATION, MY UNDERSTANDING FROM THE PAPERS IS THE
7 CIA HAS ACCEDDED IN ONE AREA COMPLETELY. IT SAYS, "WE AGREE.
8 WE ACCEPT YOUR PROFFER." IN ANOTHER, THEY'VE PARTIALLY AGREED
9 AND GIVEN PARTIAL INFORMATION, ALTHOUGH NOT FULL INFORMATION.
10 IN THE THIRD, THEY'VE SAID, "WE DON'T SEE THE RELEVANCY HERE.
11 WE DECLINE TO GIVE ANY INFORMATION ON THIS SCORE."

12 NOW, AT SOME POINT, I THINK SOMEONE WITH SOME
13 CONTEXT ABOUT WHAT THIS CASE IS ABOUT NEEDS TO MAKE THOSE
14 DETERMINATIONS. I DON'T FORECLOSE THE POSSIBILITY THAT SOME
15 JUDGE PRESIDING IN AN ADMINISTRATIVE PROCEDURES ACT HEARING
16 COULDN'T GET UP TO SPEED AND READ EVERYTHING AND UNDERSTAND
17 THE CONTEXT. BUT IT MAKES NO SENSE TO ME TO DO THAT, TO
18 BIFURCATE THE RESPONSIBILITY FOR THAT TYPE OF DETERMINATION,
19 PARTICULARLY BECAUSE IN A VERY CLOSELY RELATED CONTEXT, I'M
20 GOING TO BE CHARGED WITH THAT RESPONSIBILITY ULTIMATELY.

21 LET'S TAKE, FOR EXAMPLE, THE AREA ON WHICH YOU
22 AGREE; THAT THE DEFENDANTS ARE ENTITLED TO INFORMATION.
23 ACCESS TO INFORMATION IS QUITE DIFFERENT FROM SAYING THAT THE
24 INFORMATION CAN BE AIRED IN OPEN COURT. THAT'S THE NEXT STEP.
25 I HAVE TO MAKE THE ULTIMATE DETERMINATION ABOUT RELEVANCY. SO

1 IF I TAKE A STEP BACK AND SAY THAT'S ESSENTIALLY WHAT'S AT
2 ISSUE HERE WITH THIS CLAIM THAT YOU'RE WRONG TO WITHHOLD SOME
3 OF THE INFORMATION THEY SEEK, I WOULD BE MAKING THAT
4 DETERMINATION ULTIMATELY.

5 I DO AGREE, ALSO, GIVEN THAT WE'RE NOW, WHAT,
6 SIX MONTHS, SEVEN MONTHS INTO THE PROCEEDINGS IN THIS CASE AND
7 THE TRIAL DATE HAS BEEN SET, BUT I'VE INDICATED I'M GOING TO
8 VACATE IT IN LIGHT OF THE COUNSEL ISSUES WITH MR. WILKES --
9 BUT THE POINT IS THAT THE SPEEDY TRIAL ACT IS IMPLICATED TO
10 SOME EXTENT. I'VE HEARD NO WAIVER FROM EITHER MR. WILKES OR
11 MR. FOGGO THAT THEY DON'T CARE WHEN THEY'RE TRIED. INSTEAD, I
12 GET THE IMPRESSION FROM MR. WILKES THAT HE WANTS THIS TO BE
13 RESOLVED AS QUICKLY AS POSSIBLE.

14 SO ALL THAT TO SAY WERE DEFENDANTS NOW REQUIRED TO
15 GO THROUGH AND FILE A LAWSUIT AND WAIT THAT OUT, I AM, I HAVE
16 TO CONFESS, A LITTLE BIT UNFAMILIAR WITH THE TIMETABLE,
17 ALTHOUGH THE CASES SUGGEST THAT IT COULD BE A LONG AND
18 CUMBERSOME PROCESS. I DON'T KNOW IF THERE'S AN APPEAL FROM AN
19 INITIAL DECISION UNDER THE ADMINISTRATIVE PROCEDURES ACT.

20 BUT THE LONG AND SHORT OF IT, MR. MCPHERSON, IS WE
21 JUST TAKE A HIATUS HERE. WE'RE JUST ON HOLD. I COULDN'T
22 PRESS THE CASE FORWARD WITH THOSE ISSUES PENDING. IT SEEMS TO
23 ME, FROM A PRACTICAL SENSE STANDPOINT, THAT I OUGHT TO MAKE
24 THE DETERMINATION. AND IT DOES APPEAR TO ME THAT 9TH CIRCUIT
25 CASE LAW AGREES WITH THAT PRACTICAL SENSE INTERPRETATION.

1 THE EXXON CASE WAS A CIVIL MATTER, I UNDERSTAND.
2 BUT I AGREE WITH MR. MAC DOUGALL'S ARGUMENTS THAT THE FACTORS
3 THAT COMPEL THE CONCLUSION IN EXXON ARE IMPLICATED TO AN EVEN
4 GREATER EXTENT IN CRIMINAL CASES THAN THEY WERE IN THAT CIVIL
5 MATTER.

6 SO IN THAT RESPECT, I'M IN TENTATIVE AGREEMENT WITH
7 THE DEFENDANTS THAT THAT DECISION IN THE FIRST INSTANCE OUGHT
8 TO BE MADE BY ME. THEY OUGHT NOT TO BE REQUIRED TO GO THROUGH
9 THE ADMINISTRATIVE PROCEDURES ACT TO CHALLENGE THE INITIAL
10 DECISION CIA COUNSEL HAS MADE.

11 NOW, WHAT I'M IN DISAGREEMENT WITH IS THAT CIPA HAS
12 NO APPLICATION TO THIS WHOLE THING. I READ THE ARGUMENTS THAT
13 IT REALLY IS INAPT BECAUSE IT CONTROLS THE PRODUCTION OF
14 INFORMATION BY THE UNITED STATES TO DEFENDANT AND THEN WHAT
15 CAN BE DISSEMINATED IN OPEN COURT.

16 AT ITS BASE, THIS IS A DISPUTE ABOUT CLASSIFIED
17 INFORMATION. AND THE CIA HAS EVERY RIGHT TO INSTRUCT ITS
18 EMPLOYEES WHO ARE CONTRACTUALLY BOUND NOT TO REVEAL THE
19 INFORMATION, NOT TO TALK TO THE DEFENSE UNLESS THEY BELIEVE
20 IT'S BEEN ORDERED BY A COURT OR IT'S CONSISTENT WITH THE TOUHY
21 REGULATIONS.

22 I TAKE THE POINT THAT THESE ARE PEOPLE WHO, AT LEAST
23 IN THE INSTANCE OF THE SIX OR SEVEN PEOPLE WHO'VE AGREED NOW
24 TO BE INTERVIEWED, THAT THESE ARE VOLUNTARY INTERVIEWS AS
25 OPPOSED TO SOMETHING ORDERED PURSUANT TO RULE 16 OR THE JENCKS

1 ACT.

2 BUT AT THE END OF THE DAY, THE INFORMATION TO BE
3 DISCUSSED IS STILL CLASSIFIED INFORMATION IN WHICH THE UNITED
4 STATES GOVERNMENT HAS A GREAT INTEREST IN SECRECY AND
5 MAINTAINING THE SECRECY OF IT. SO I AM INFORMED AND THE
6 ISSUE, I BELIEVE, IS INFORMED BY THE CLASSIFIED INFORMATION
7 PROTECTION ACT. SO A LITTLE BIT TO BOTH SIDES AT LEAST IN MY
8 TENTATIVE THINKING.

9 NOW, I'M HAPPY TO HEAR, I SUPPOSE, FIRST FROM YOU,
10 MR. MAC DOUGALL, BECAUSE I DO THINK CIPA APPLIES. BUT I'M
11 INCLINED TO MAKE THE DECISION MYSELF AND NOT REQUIRE YOU TO GO
12 FILE A LAWSUIT IN SOME OTHER JURISDICTION.

13 MR. MAC DOUGALL: I THINK THE MOST IMPORTANT THING
14 THAT MR. FOGGO WOULD ASK THE COURT TO KEEP IN MIND IS THE
15 RELIEF WE'RE ASKING FOR HERE IS VERY NARROW. IT'S LIMITED TO,
16 ONE, SCI'S BEING READ IN. I'M GOING TO BE VERY CAREFUL. AND
17 IF I MISSTEP, I'LL STOP.

18 ALL WE'RE ASKING IS TO BE READ INTO TWO SCI'S.
19 WE'RE BEEN READ INTO SEVERAL. THE DEFENSE HAS GONE TO GREAT
20 PAINS, AS I THINK THE COURT IS AWARE, TO COMPLY WITH THE
21 COMPLEX STRUCTURE THAT'S BEEN SET UP TO PROTECT CLASSIFIED
22 INFORMATION. WE'RE TRYING TO LIVE WITHIN THAT.

23 AT THE SAME TIME, WE'RE TRYING TO ZEALOUSLY DEFEND
24 MR. FOGGO AND, IN PARTICULAR, PROTECT HIS 6TH AMENDMENT
25 RIGHTS. SO THE ONLY RELIEF WE'VE ASKED THE COURT FOR, ALL

1 WE'VE ASKED THE COURT TO DO IS TO ORDER THE CIA TO DO WHAT IT
2 HAS DONE IN OTHER COMPARTMENTS AND ALLOW US TO BE READ IN SO
3 THAT WHEN WE'RE SITTING WITH ONE OF THESE WILLING WITNESSES
4 WHO ARE ALSO READ INTO THE COMPARTMENT, WE CAN ASK QUESTIONS
5 THAT WE BELIEVE ARE CRITICAL TO OUR DEFENSE -- AND WE'VE
6 COMMITTED TO DO AN EX PARTE PRESENTATION LATER ON, AND THE
7 COURT WILL SEE THAT -- ASK THE QUESTIONS AND GET THE ANSWERS
8 THAT WILL ALLOW US TO PUT THAT TOGETHER.

9 THAT'S A SEALED COMPARTMENT. WE'RE UNDER THE SAME
10 CONSTRAINTS AS THOSE CIA EMPLOYEES WITH REGARD TO DISCLOSURE,
11 WITH REGARD TO PROTECTION. I KNOW THE COURT HAS HEARD FROM US
12 MORE THAN YOU WOULD LIKE ABOUT S.C.I.F. ACCESS AND SO FORTH.

13 SO WHAT WE'RE TALKING ABOUT IS A VERY NARROW BIT OF
14 RELIEF WHERE WE'RE ALLOWED TO ASK THESE CLEARED WITNESSES
15 ABOUT INFORMATION THAT WE OURSELVES WOULD BE CLEARED INTO IN A
16 SEALED COMPARTMENT.

17 THE COURT: IT SEEMS TO ME, THOUGH, THIS GETS BACK
18 TO THE POINT I APPARENTLY DIDN'T MAKE -- I DON'T THINK I MADE
19 IT CLEAR ENOUGH. IT SEEMS TO ME THAT THE PROCEDURAL WRANGLING
20 NOT ONLY ABOUT WHO DECIDES THIS, BUT WHETHER YOU GET READ IN,
21 ALL SORT OF BEGS THE QUESTION -- THE REAL QUESTION IS DO YOU
22 HAVE A RIGHT TO ASK THESE WILLING WITNESSES THE QUESTIONS YOU
23 WANT TO ASK THEM? AND IF THEY'RE WILLING, SHOULD THE CIA GIVE
24 THEM PERMISSION TO ANSWER THAT? BECAUSE I COULD VERY WELL
25 FORESEE, MR. MAC DOUGALL, THEY'LL SAY "FINE. WE'LL LET YOU

1 IN. BUT THESE PEOPLE ARE GOING TO BE UNDER EXPLICIT
2 INSTRUCTIONS NOT TO GET INTO CERTAIN THINGS," AND IT WILL BE
3 VERY NONPRODUCTIVE.

4 IT SEEMS TO ME THAT THE ISSUE I OUGHT TO DECIDE
5 IS -- AND I UNDERSTAND I'D HAVE TO DO THIS IN A CONFIDENTIAL
6 SETTING -- I'VE GOT TO DECIDE "GIVE ME YOUR PROFFER. TELL
7 ME" -- BECAUSE I DON'T HAVE IT. IT'S NOT CLEAR TO ME. I KNOW
8 WHAT THE ISSUES ARE, I KNOW WHAT THE GENERAL SUBJECT MATTER
9 IS, BUT I DON'T HAVE THE BENEFIT OF THE DEFENDANT'S PROFFER
10 THAT WAS MADE TO THE CIA ON THIS. "GIVE ME YOUR PROFFER, HUM
11 A FEW BARS TO ME ABOUT THE RELEVANCE, AND THEN LET ME MAKE
12 THAT DETERMINATION." AND THEN THAT WOULD GUIDE THESE OTHER
13 THINGS.

14 I THINK IF THE CIA -- WELL, I DON'T KNOW THIS FOR
15 SURE. I MEAN, THEY CAN TAKE AN APPEAL, I SUPPOSE. BUT IF THE
16 CIA FINDS THAT I FIND THAT IT IS RELEVANT TO THEORY OF
17 DEFENSE, I WOULD EXPECT THAT EITHER THEY'LL APPEAL OR THEY'LL
18 ACQUIESCE AND INSTRUCT THE WITNESSES THAT THEY MAY ANSWER THE
19 QUESTIONS; ALL OF THIS, OF COURSE, SUBJECT TO THE CIPA
20 PROVISIONS LATER ON THAT DOESN'T CONTROL WHAT'S GOING TO COME
21 OUT OF THE TRIAL. BUT IT WOULD ALLOW THEM FREE ACCESS TO THE
22 WITNESSES TO FIND OUT THE INFORMATION THAT THEY NEED TO BE
23 PREPARED.

24 ISN'T THAT REALLY WHAT'S AT ISSUE HERE, THE
25 SUBSTANCE OF WHAT YOU WANT TO ASK AND WHETHER SOMEBODY

1 DETERMINES THAT IT IS, IN FACT, RELEVANT TO THE CHARGES
2 AGAINST MR. FOGGO AND THE MANNER IN WHICH HE'LL DEFEND
3 HIMSELF?

4 MR. MAC DOUGALL: WITH REGARD TO THE WITNESSES WHO
5 WE DESCRIBED AS WILLING WITNESSES, WE'VE RECEIVED TOUHY
6 AUTHORIZATION LETTERS FROM THE CIA. THIS IS INFORMATION THAT
7 THE SUBSTANCE OF THE INFORMATION ARE THINGS THAT WE'RE ALREADY
8 AWARE OF THROUGH OUR CLIENT. WHAT WE'RE LOOKING FOR FROM
9 THESE WITNESSES IS OBVIOUSLY CORROBORATION AND LEADS TO OTHER
10 VERY CRITICAL AREAS.

11 AND I AGREE WITH THE COURT THAT ONCE WE READ THAT
12 SEALED COMPARTMENT, WE COME TO THE COURT AND COME TO THE COURT
13 SECURITY OFFICER AND HAND IT TO THE GOVERNMENT AND SAY, "WE
14 WANT TO USE THIS EVIDENCE." BUT I THINK THE MOUSAWI COURT,
15 BOTH THE DISTRICT COURT AND THE 4TH CIRCUIT, ANALYZED THAT
16 VERY CLEARLY. AND I'M QUOTING FROM MEMORY, BUT IN THE
17 4TH CIRCUIT OPINION, THEY SAID PRE-TRIAL INTERVIEWS ARE NOT
18 COVERED BY SECTION 6 OF CIPA.

19 AND THE OTHER THING I'D PUT OUT AND ASK THE COURT TO
20 CONSIDER IS THAT WAS A CASE IN WHICH THE DEFENDANT WAS ON
21 TRIAL FOR HIS LIFE, WAS ACCUSED OF PARTICIPATING IN ONE OF THE
22 MOST HEINOUS CRIMES IN OUR HISTORY. MR. FOGGO'S UNDER
23 INDICTMENT FOR GOING TO DINNER. NOT THAT THAT'S A SMALL
24 THING, BUT NO ONE'S EVER ACCUSED HIM OF VIOLATING ANY FEDERAL
25 LAW RELATING TO ESPIONAGE OR TERRORISM. THIS IS A DIFFERENT

1 THING.

2 WE'VE DEMONSTRATED, THE DEFENSE, A LEVEL OF
3 RESPONSIBILITY. THE CIA CAN BE COMFORTABLE BECAUSE
4 ULTIMATELY, THE QUESTION THAT I THINK WE HAVE TO ASK IS WHAT
5 IS IT THEY DON'T WANT US TO KNOW? WHAT IS IT THAT THEY DON'T
6 WANT US TO KNOW AND BRING TO THE COURT UNDER CIPA PROVISIONS?

7 THE COURT: IT'S DISCONCERTING TO ME THAT THEY DON'T
8 HAVE THE LEVEL OF COMFORT THAT YOU THINK THEY SHOULD HAVE. I
9 KNOW MY OWN LIMITATIONS HERE. THESE GENTLEMEN KNOW WHAT THE
10 CONCERNS ARE THAT ANIMATE THE DENIAL AND INFORM THEIR DENIAL.
11 I DON'T. I WAS NEVER IN THE CIA OR EVEN THE MILITARY, FOR
12 THAT MATTER. I KNOW WHAT I DON'T KNOW, AND IT SORT OF
13 INTIMIDATES ME IN THIS RESPECT. I DON'T WANT TO SUBSTITUTE MY
14 JUDGMENT FOR THEIRS IN THE FIRST INSTANCE, PARTICULARLY WHEN I
15 LOOK AT THE CORRESPONDENCE AND IT DOESN'T APPEAR TO ME AT ALL
16 THAT THEY HAVE BEEN INSTINCTIVELY NEGATIVE SAYING, "NO, YOU
17 CAN'T HAVE ANYTHING." I HASN'T BEEN LIKE THAT.

18 IT APPEARS TO ME FROM THE CORRESPONDENCE BETWEEN YOU
19 THE CIA THAT THEY'VE BEEN VERY THOUGHTFUL IN EVALUATING THE
20 REQUESTS AND THE RESPONSES BACK, WERE THOUGHTFUL. AND THAT
21 GIVES ME SOME CONFIDENCE THAT THERE'S SOMETHING BEHIND THIS
22 THAT I DON'T KNOW THAT'S OF CONCERN TO THEM.

23 AT WHAT POINT IN THIS EQUATION DO I GIVE SOME
24 DEFERENCE TO OUR SECRET-KEEPERS HERE THAT THEY'RE DOING WHAT
25 THEY'RE TASKED WITH DOING AND SAY I'VE GOT TO DEFER TO THEM ON

1 THIS UNLESS I FIND THERE'S SOME OVERRIDING REASON UNDER THE
2 6TH AMENDMENT AND MR. FOGGO NEEDS THIS TO DEFEND HIMSELF?

3 MR. MAC DOUGALL: I THINK THAT POINT IS WHEN WE ARE
4 MAKING A REQUEST THAT THE COURT DETERMINES, BASED UPON THE
5 INFORMATION THAT WE PROVIDE, TO BE UNREASONABLE. WITHOUT
6 GOING INTO DETAIL, THE INDICTMENT IN THIS CASE WAS FASHIONED
7 THROUGH A CIA INVESTIGATION, INSPECTOR GENERAL'S
8 INVESTIGATION. THEY CHOSE THE TRANSACTIONS THAT WERE GOING TO
9 BE THE BASIS FOR THESE CRIMINAL CHARGES. THEY KNEW OR
10 CERTAINLY SHOULD HAVE KNOWN THAT THOSE TRANSACTIONS WERE
11 INTERTWINED WITH HIGHLY SENSITIVE MATERIALS, SO SENSITIVE THAT
12 WE'RE HERE TODAY.

13 AND I THINK, YOUR HONOR, THAT ULTIMATELY THE
14 JUDGMENT OF THE COURTS -- WHEN WE MAKE A PROFFER AND SAY "I
15 JUST DON'T GET IT. I THINK YOU'RE FISHING NOW," THE COURT
16 KNOWS THAT WE'RE NOT BEING PAID FOR THIS, SO WE'RE NOT OUT TO
17 WASTE OUR TIME. AND I THINK THE COURT ULTIMATELY IS GOING TO
18 HAVE TO MAKE A DECISION BASED UPON THE EVIDENCE AND THE THEORY
19 THAT WE PUT IN FRONT OF YOU WHETHER WE'RE APPROPRIATE. AND I
20 THINK THAT'S ENTIRELY WITHIN THE DISCRETION OF THE COURT.

21 THE COURT: YOU SAY THAT HAPPENS LATER, NOT
22 MY QUESTION IS, THEN, WHAT DEFERENCE DO I GIVE TO
23 THE CIA WHO'S RESISTANT TO SOME OF THESE THINGS AND DOESN'T
24 EVEN WANT TO DISSEMINATE IT UNDERSTANDING THAT YOU HAVE A
25 CLEARANCE? SOME OF THESE THINGS, I TAKE, ARE SO HIGHLY SECRET

1 THAT THEY SAY, "LOOK, WE DON'T THINK THIS HAS ANY RELEVANCY,
2 AND WE DON'T WANT TO RISK IT. EVEN THOUGH WE'VE GOT COMPLETE
3 FAITH IN MR. MAC DOUGALL AND THE DEFENSE TEAM, WE'RE NOT
4 DISSEMINATING IT." DO I HAVE TO GIVE THAT SOME DEFERENCE?

5 MR. MAC DOUGALL: IT SHOULD BE GIVEN SOME DEFERENCE.
6 BUT IN THIS CASE WITH THESE SCI'S THAT WE'RE ASKING FOR, WE
7 BELIEVE THERE'S COMPELLING EVIDENCE THAT IMPLICATES NOT
8 JUST CIPA, NOT JUST THE CIA STATUTORY BASIS, BUT MR. FOGGO'S
9 6TH AMENDMENT RIGHTS. AS THE COURT HAS OBSERVED QUITE
10 CORRECTLY OVER AND OVER AGAIN, THE CONSTITUTION TRUMPS
11 STATUTES.

12 AND IF WE ARE ABLE TO MAKE A SHOWING THAT IS
13 FUNDAMENTAL TO OUR DEFENSE, TO OUR RIGHT TO CONFRONT
14 WITNESSES, TO OUR RIGHT TO INVESTIGATE THE CASE ON BEHALF OF
15 MR. FOGGO, I THINK IT'S ENTIRELY WITHIN THE COURT'S DISCRETION
16 TO SAY "I THINK YOU'RE ACTING IN GOOD FAITH, CIA, BUT I'VE
17 HEARD IT. AND MY, JUDGMENT, BASED UPON WHAT I KNOW OF THIS
18 CASE, IS THESE LAWYERS SHOULD BE PERMITTED TO ASK" -- THAT'S
19 ALL WE'RE ASKING FOR -- "TO ASK THESE WITNESSES QUESTIONS" IN
20 AN AREA THAT WE ALREADY KNOW 90 PERCENT, I SUSPECT, OF WHAT
21 THERE IS OUT THERE.

22 THE COURT: WHAT'S YOUR REACTION GOING TO BE,
23 MR. MAC DOUGALL, IF I GRANT THAT, BUT THE CIA THEN SAYS,
24 "FINE. WE'RE INSTRUCTING OUR EMPLOYEES NOT TO ANSWER
25 QUESTIONS IN THESE AREAS"? WHAT'S THE NEXT MOVE BY YOU AND

1 OTHER COUNSEL FOR MR. FOGGO, TO COME IN AND GET SOME KIND OF
2 ORDER -- IT'S A VOLUNTARY INTERVIEW. I CAN'T IMAGINE THAT I
3 WOULD COMPEL THEM TO ANSWER QUESTIONS UNDER THOSE
4 CIRCUMSTANCES.

5 MR. MAC DOUGALL: WHEN YOU GO TO WORK FOR THE CIA --
6 I'VE NEVER WORKED FOR THE CIA -- YOU DON'T RESTRICT OUR
7 MOVEMENTS. YOU HAVE A RIGHT. AND THEN THERE'S RESTRAINTS
8 THAT THE CIA IMPOSES ON YOU. AND WHEN YOU UNDERTAKE AND IT IS
9 INCUMBENT UPON YOU TO EXERCISE YOUR RIGHT TO SPEAK TO COUNSEL,
10 TO PARTICIPATE IN TRIALS, TO ASSIST OTHERS WHO ARE DEFENDING
11 THEMSELVES. SO THAT'S THEIR RIGHT.

12 NOW, IF THE CIA SAYS "WE'RE INSTRUCTING YOU NOT TO
13 TALK," I THINK WE WOULD COME BACK TO THE COURT, AND I THINK WE
14 WOULD ASK FOR AN ORDER. AND I RESPECTFULLY SUGGEST THAT THE
15 COURT SHOULD GRANT THAT ORDER. BECAUSE AGAIN, THIS IS A CASE
16 THAT HAS BEEN STRUCTURED BY THE CIA, BY ITS INSPECTOR
17 GENERAL'S OFFICE, BASED UPON CERTAIN FACTS. AND TO SAY THAT
18 "WE'RE ALLOWED TO USE THAT SO TO PROSECUTE YOU AND SEND YOU TO
19 PRISON. BUT WHEN YOU WANT TO USE THAT INFORMATION, WHEN YOU
20 WANT TO FIND OUT WHAT THOSE WITNESSES REALLY HAD TO SAY, WHAT
21 THEY WEREN'T -- WHAT DIDN'T GO INTO THOSE INTERVIEWS, YOU
22 CAN'T HAVE THAT," THAT'S NOT THE CONSTITUTION, YOUR HONOR.
23 AND WE WOULD CERTAINLY COME BACK TO THIS COURT AND ASK THE
24 COURT TO ENFORCE IT.

25 THE COURT: ALL THE WITNESSES WHO HAVE AGREED TO

1 TALK TO YOU, ARE THESE ALL PEOPLE THAT YOU BELIEVE TO BE
2 PROSECUTION WITNESSES IN THIS CASE?

3 MR. MAC DOUGALL: WELL, WHO THE GOVERNMENT CALLS IS
4 AT THE GOVERNMENT'S DISCRETION. THEY'RE CERTAINLY ALL PEOPLE
5 WHO HAVE BEEN INTERVIEWED BY THE GOVERNMENT, SOME OF THEM BY
6 THE GRAND JURY.

7 THE COURT: OKAY. I TAKE IT --

8 MR. MAC DOUGALL: MAY I HAVE A MOMENT, YOUR HONOR?

9 (DISCUSSION OFF THE RECORD BETWEEN COUNSEL)

10 MR. MAC DOUGALL: I'M CORRECTED, YOUR HONOR, THAT
11 THERE ARE PEOPLE ON THAT LIST THAT HAVE NOT BEEN INTERVIEWED.

12 THE COURT: I TAKE IT YOU'RE IN AGREEMENT THAT I
13 SHOULD MAKE A JURISDICTIONAL DECISION IN THE FIRST INSTANCE --

14 MR. MAC DOUGALL: YES.

15 THE COURT: -- AND NOT REQUIRE YOU TO FILE A
16 LAWSUIT?

17 MR. MAC DOUGALL: YES.

18 THE COURT: ANYTHING ELSE, MR. MAC DOUGALL?

19 MR. MAC DOUGALL: THANK YOU.

20 MR. HALPERN: YOUR HONOR, I THINK I'D LIKE TO START
21 JUST BY TAKING A STEP BACK. IT'S VERY HARD TO ARGUE WHEN
22 YOU'VE WON AND YOU'VE INVITED THE UNITED STATES TO BE HERE
23 THROUGH THE DEPARTMENT OF JUSTICE TO QUARREL WITH THE COURT'S
24 DECISION. SO I DON'T MEAN TO QUARREL WITH THE COURT'S
25 DECISION, BUT I THINK IT'S IMPORTANT TO SEE HOW WE GOT HERE.

1 BECAUSE I THINK WHEN YOU LOOK BACK, THE COURT'S PROTECTIVE
2 ORDER HAS, IN FACT, SPAWNED A VARIETY OF RAMIFICATIONS THAT I
3 THINK WENT FAR BEYOND WHAT THIS COURT ORIGINALLY ENVISIONED.

4 AND WHILE I APPRECIATE MR. MAC DOUGALL'S OFFER OR
5 COMMENTS THAT HE DOESN'T CARE REALLY WHO REPRESENTS THE
6 GOVERNMENT, I THINK THAT IS BELIED SOMEWHAT BY THE FACT THAT
7 I'M SITTING UP HERE TODAY WITH ABSOLUTELY NO KNOWLEDGE AT ALL
8 OF WHAT HIS ARGUMENT IS. THE COURT HAS AN IDEA OF WHAT THE
9 ARGUMENT IS. MR. MCPHERSON HAS SOME IDEA OF WHAT THE ARGUMENT
10 IS BECAUSE HE GOT IT YESTERDAY. I STILL HAVEN'T SEEN THE
11 BRIEFING PAPERS. THAT'S A FUNDAMENTAL PROBLEM.

12 SO AT THE VERY BEGINNING, I THINK, WHAT WE FILED
13 SOMETHING LAST NIGHT WAS SIMPLY TO TELL THE COURT WE'VE GOT TO
14 GET THIS SHIP SAILING THE APPROPRIATE WAY. BECAUSE I THINK
15 WHAT THE COURT PROPERLY DID HAS RESULTED IN MANY, MANY THINGS
16 THAT ARE IMPROPER. AND I THINK STARTING, NUMBER ONE, IT'S
17 RESULTED IN THE COURT RECEIVING EX PARTE COMMUNICATIONS FROM
18 THE DEFENSE IN THIS CASE. WHEN I SAY "EX PARTE," I'M TALKING
19 NOT ONLY THE GOVERNMENT HAS NO IDEA WHAT THEY ARE, BUT THE CIA
20 HAD NO IDEA WHAT THEY WERE.

21 THE COURT: I THINK WE CURED THAT AT THE LAST
22 HEARING. I ASKED MR. MAC DOUGALL FROM NOW ON TO COPY
23 MR. MCPHERSON ON ANYTHING HAVING TO DO WITH THIS ISSUE OF WHO
24 IS TO BE INTERVIEWED AND WHAT INFORMATION IS AT PLAY.

25 I THINK HE DID THEREAFTER; RIGHT?

1 MR. MCPHERSON: THAT'S CORRECT.

2 MR. HALPERN: WELL, IT'S ONLY PARTIALLY CORRECT.
3 THAT'S WHY I BRING IT UP. I DON'T FAULT THE COURT FOR THIS AT
4 ALL. I THINK THE COURT WAS VERY CLEAR WHAT WAS SO TROUBLING
5 IS -- AND MR. MCPHERSON IS BEING VERY GRACIOUS, AND PERHAPS
6 I'M NOT AS GRACIOUS AS HE IS. BUT WHEN HE RECEIVES THE
7 INFORMATION THAT THE COURT SAID THE CIA HAD THE RIGHT TO
8 CONSIDER THE DAY HE'S FILING HIS MOTION RESPONSE, I DON'T
9 THINK THAT'S APPROPRIATE. MOREOVER, HE'S FILED A MOTION
10 RESPONSE OBJECTING TO WHAT'S GOING ON WITHOUT EVEN HAVING SEEN
11 THE PAPERS FROM THE DEFENSE.

12 AGAIN, I KNOW THE COURT DIDN'T ENVISION THAT. I
13 FELT IT WAS SOMEWHAT CHILDISH THE OTHER DAY WHEN I WAS ARGUING
14 "WELL, WE HAVE HAD MULTIPLE HEARINGS. WE NEED TO HAVE -- WE
15 NEED TO KNOW FROM THE GOVERNMENT HOW MANY HEARINGS WE'RE GOING
16 TO HAVE," I KNOW THINGS COME UP IN TRIAL, THINGS COME UP IN
17 PRE-TRIAL LITIGATION WHERE EVEN THOUGH THE COURT HAS SET
18 CERTAIN HEARING DATES, SOMETHING COMES UP AND SOMEBODY HAS TO
19 FILE. THAT'S ALL WELL AND GOOD.

20 BUT I KNOW THE COURT, FROM LONG EXPERIENCE, LIKES
21 THINGS FILED PROPERLY WITH NOTICE TO THE OTHER SIDE IN
22 APPROPRIATE TIME FRAMES. BECAUSE WHEN WE DON'T DO IT THAT
23 WAY, FROM THE GOVERNMENT'S POINT OF VIEW, WE'RE NOT ABLE TO
24 GIVE YOU OUR VIEW OF WHAT SHOULD BE DONE. AND THE COURT IS
25 TRYING TO MAKE A DECISION WITH ONLY INFORMATION FROM ONE SIDE,

1 AND THAT MAKES YOUR JOB DIFFICULT.

2 THE COURT: SEE, THAT'S THE NATURE OF THE PROCESS
3 HERE, MR. HALPERN. AS YOU KNOW, YOU'RE NOT ENTITLED TO KNOW
4 WHAT THEIR PROFFER IS TO THE CIA. THAT'S THE PROBLEM. YOU
5 CAN'T KNOW WHAT THEIR MENTAL PROCESSES ARE ABOUT WHY THEY
6 THINK SOMETHING IS RELEVANT, WHY IT PERTAINS TO THEIR DEFENSE.
7 THEY'RE UNDER NO OBLIGATION TO INFORM THE ACCUSER OF THAT.

8 NOW, IT'S A DIFFERENT SITUATION. I ACKNOWLEDGE
9 THAT. THAT'S WHY I ISSUED THE ORDER FORBIDDING THE CIA FROM
10 SHARING THOSE PROFFERS WITH YOU. IT WAS A WAY TO ACCOMMODATE
11 THE RECEIPT OF THE INFORMATION WITHOUT COMPROMISING
12 MR. FOGGO'S 6TH AMENDMENT RIGHT TO EFFECTIVE REPRESENTATION BY
13 COUNSEL AND HIS 5TH AMENDMENT RIGHTS ABOUT COMPELLED
14 SELF-INCRIMINATION, THAT TYPE OF THING.

15 MR. HALPERN: WHILE I DON'T QUARREL IN GENERAL WITH
16 THE POINT THE COURT'S MAKING, I THINK AS APPLIED IN THIS CASE
17 I DO TAKE ISSUE WITH IT. AND IF I CAN JUST EXPLAIN WHY, YOUR
18 HONOR.

19 THE GOVERNMENT -- AND I WILL SAY RELUCTANTLY,
20 BECAUSE IT WAS RELUCTANT. BUT WE CONSIDERED THIS EXACT
21 ARGUMENT THAT THE COURT MADE IN REFERENCE TO THE TOUHY ISSUE
22 THAT WAS BROUGHT UP SEVERAL MONTHS AGO NOW. AND WE
23 RELUCTANTLY AGREED. WE SAID, "OKAY. WE DON'T NEED TO KNOW
24 THE NAMES OF WHO THESE PEOPLE ARE. WE DON'T NEED TO KNOW WHAT
25 THEY WANT TO TALK ABOUT." AT THAT POINT, WE DIDN'T CONCEDE

1 THAT, IN FACT, THIS WAS NECESSARY BY LAW BECAUSE WE'RE -- I'M
2 NOT AWARE OF ANY PRE-TRIAL LITIGATION PRIVILEGE.

3 BUT ASSUMING IT IS AND EVEN IF NOT, AS A MATTER OF
4 FAIR PLAY WE AGREED TO IT WHEN THE COURT SUGGESTED IT. BUT
5 THAT HAD WITH IT DIRECT CONSEQUENCES. THE FIRST CONSEQUENCE
6 OF GOING DOWN THAT PATH, YOUR HONOR, WAS THAT WE ADOPTED THE
7 FRAMEWORK OF THE TOUHY REGULATIONS BECAUSE IT CAME UP IN THE
8 TOUHY FRAMEWORK. ONCE WE ADOPTED THOSE REGULATIONS, WE
9 NECESSARILY DECIDED WHAT THE STANDARD OF REVIEW WAS GOING TO
10 BE, WHAT COURT WAS GOING TO DO IT. THIS WAS NOT THE
11 GOVERNMENT'S CHOICE AT THAT TIME.

12 WHAT'S REALLY AT ISSUE HERE IS AT THIS POINT NOW,
13 TWO MONTHS LATER, SHOULD THE COURT DISREGARD WHAT THEY DECIDED
14 TO DO AND SOMEHOW TRY TO REACH A COMPROMISE -- YOU KNOW, LOOK
15 AT THE EXXON CASE AND FASHION SOME TYPE OF REMEDY, OR SHOULD
16 THE COURT DO WHAT THE GOVERNMENT THOUGHT WAS APPROPRIATE IN
17 THE BEGINNING AND GIVE THEM A CHOICE? THEY WANT TO GO TOUHY,
18 FINE. THEY DON'T, THE QUESTION IS TO GO THROUGH THE NORMAL
19 DISCOVERY CHANNELS AND GO THROUGH CIPA.

20 AND WHILE SECTION 6 CIPA MIGHT NOT APPLY -- AND IT
21 DOESN'T APPLY -- SECTION 4 DOES. AND IF THIS IS A DISCOVERY
22 REQUEST, WE NEED TO KNOW WHAT IT SO WE CAN INFORM THE CIA.

23 NOW, MR. MAC DOUGALL KIND OF WANTS HIS CAKE AND HE
24 WANT TO EAT IT, TOO. AND THERE'S NO JURY HERE, SO I DON'T
25 HAVE TO MAKE A CLAIM THAT THIS CASE IS ABOUT MEALS. IF THE

1 CASE IS ABOUT MEALS, HE DOESN'T NEED ANY CLASSIFIED
2 INFORMATION WHATSOEVER TO DEFEND IT.

3 I THINK HE KNOWS, AS DOES THE GOVERNMENT, THIS CASE
4 IS ABOUT SOMEONE WHO DISREGARDED HIS OATH OF OFFICE AND, IN
5 FACT, REVEALED CLASSIFIED INFORMATION. IF WHAT HE WANTS
6 INVOLVES THAT CLASSIFIED INFORMATION, WE CAN WORK WITH THE
7 CIA. IF IT'S DISCOVERABLE, WE HAVE AN OBLIGATION TO GIVE IT
8 TO HIM.

9 THE COURT: HERE'S WHERE IT BREAKS DOWN, THOUGH,
10 MR. HALPERN: IT'S ONE THING FOR HIM TO SAY, "I WANT TO
11 INTERVIEW THESE PEOPLE. TELL THE CIA." THE FIRST QUESTION I
12 THINK MR. MCPHERSON'S GOING TO ASK YOU IS "WHAT'S HE GOING TO
13 INTERVIEW THEM ABOUT? WHAT DOES HE WANT TO KNOW? WHAT
14 QUESTIONS IS HE GOING TO PUT TO THEM? WHAT INFORMATION IS
15 IMPLICATED?"

16 NOW, HE HAS NO OBLIGATION TO TELL YOU THAT. IT
17 TURNS THE WHOLE CRIMINAL PROCESS ON ITS HEAD TO SAY, "WELL, HE
18 HAS TO GO THROUGH US FIRST." IT GIVES YOU AN UNFAIR ADVANTAGE
19 THAT YOU DON'T HAVE IN OTHER CASES. IN MOST OTHER CASES, YOU
20 DON'T HAVE ANY IDEA WHETHER THERE'S GOING TO BE A DEFENSE,
21 WHAT THE DEFENSE IS, WHAT WITNESSES THE DEFENSE IS GOING TO
22 CALL, WHAT THEIR THEORY OF DEFENSE IS UNTIL THEY BEGIN
23 PRESENTING IT.

24 I'VE BEEN THERE AND DONE THAT. I KNOW THE
25 DISCONCERTING FEELING WHEN YOU HEAR A NAME THAT YOU'VE NEVER

1 HEARD BEFORE AND SOMEBODY IS WALKING IN BEHIND YOU AND YOU
2 START SCRIBBLING NOTES RIGHT AWAY. THAT'S THE NATURE OF OUR
3 SYSTEM.

4 YOU'RE SUGGESTING THAT BECAUSE THIS INVOLVES
5 CLASSIFIED INFORMATION, THAT THE STATUTE SOMEHOW TRUMPS OUR
6 PRINCIPLES AND CONVENTIONS THAT I FIND ARE BASED ON
7 CONSTITUTIONAL PROTECTIONS THAT MR. FOGGO HAS.

8 MR. HALPERN: I'M NOT SAYING IT TRUMPS IT AGAIN.
9 THAT TERM HAS BEEN BANDIED ABOUT A LOT.

10 THE COURT: I THINK I USED IT IN THE FIRST INSTANCE,
11 NOT GERAGOS.

12 MR. HALPERN: WHAT I'VE ALWAYS SAID AND WHAT THE
13 POSITION OF THE GOVERNMENT HAS ALWAYS BEEN, CIPA SIMPLY
14 PROVIDES PROCEDURAL FRAMEWORK FOR APPLYING THE NORMAL FEDERAL
15 RULES. I'M NOT TAKING ANY DIFFERENT POSITION.

16 THE COURT: IF I APPLY IT IN THE WAY THAT YOU'RE
17 SUGGESTING, I THINK IT'S VIOLATIVE OF THE DEFENDANT'S 5TH AND
18 6TH AMENDMENT RIGHTS. WHAT YOU'RE -- IF I UNDERSTAND YOU
19 CORRECTLY, WHAT YOU'RE ADVOCATING IS MR. MAC DOUGALL HAS TO
20 COME TO YOU, THE PROSECUTORS, FIRST AND SAY, "HERE'S THE
21 INFORMATION I WANT, AND HERE'S WHY I WANT IT. HERE'S WHY I
22 THINK IT'S RELEVANT TO OUR DEFENSE."

23 THAT'S WHERE IT STARTS TO BREAK DOWN FOR ME BECAUSE
24 HE HAS NO SUCH OBLIGATION. IN FACT, HE'S GOT A PRIVILEGE,
25 MR. FOGGO HAS A PRIVILEGE, NOT TO HAVE TO TELL YOU THAT

1 INFORMATION.

2 HOW DOES HE GET TO RELEVANT INFORMATION? HE MAKES
3 THE POINT THAT YOU GUYS CRAFTED THE INDICTMENT. YOU PICKED
4 THE TRANSACTIONS. THEN YOU SAY, "WELL, YOU'VE GOT TO TELL US
5 HOW YOU'RE GOING TO DEFEND AGAINST THESE TRANSACTIONS OR YOU
6 CAN'T HAVE THE INFORMATION." THAT DOESN'T SEEM RIGHT OR LEGAL
7 TO ME.

8 MR. HALPERN: TWO POINTS.

9 ONE, AS FAR AS CIPA GOES, I THINK THE COURT REACHED
10 THIS POINT IN OUR LAST HEARING. CIPA, AS APPLIED, WILL FORCE
11 THE DEFENDANT TO REVEAL CERTAIN INFORMATION, MAYBE EVEN
12 CERTAIN QUESTIONS HE IS GOING TO ASK WITNESSES, BEFORE HE ASKS
13 THOSE QUESTIONS. THIS IS SOMETHING THAT IN NO OTHER CASE DO
14 YOU HAVE TO DO. THAT'S JUST WHAT THE LAW IS. IT'S BEEN FOUND
15 TO BE CONSTITUTIONAL BY THE SUPREME COURT OF THE UNITED STATES
16 AND EVERY CIRCUIT COURT THAT HAS ADOPTED IT.

17 SO THE VERY NOTION THAT IN THIS CASE THE DEFENDANT
18 WILL LOSE RIGHTS HE OTHERWISE MIGHT HAVE, WHILE TRUE, DOESN'T
19 MAKE IT UNCONSTITUTIONAL. AND WE DISAGREE WITH THAT. AND I
20 THINK THE COURT KNOWS THAT. BECAUSE AT THE LAST HEARING, YOU
21 SAID, "WELL, SECTION 5, THAT'S AT TRIAL, RIGHT BEFORE TRIAL.
22 WE'RE BEFORE THAT. IT HASN'T CRYSTALLIZED," I THINK WAS THE
23 WORD OF THE COURT.

24 SO THIS IS A PREGNANT ISSUE; YOU'RE EITHER PREGNANT
25 OR YOU'RE NOT PREGNANT. EITHER THEY'RE GOING TO HAVE TO GIVE

1 UP RIGHTS OR THEY'RE NOT. THEY ARE GOING TO HAVE TO GIVE UP
2 SOME GENERAL RIGHTS THAT THEY MIGHT HAVE OTHERWISE HAD. BUT
3 THEY'RE NOT CONSTITUTIONAL RIGHTS. THESE ARE RIGHTS YOU GIVE
4 UP IN EVERY CASE.

5 SO THAT'S THE FIRST POINT.

6 THE COURT: WHAT'S THE DOWNSIDE TO THE COMPROMISE
7 POSITION THAT I CAN CUT YOU OUT AND THAT THE CIA, THROUGH
8 MR. MCPHERSON, IS TOTALLY CAPABLE OF SAYING "WE'VE GOT AN
9 INTEREST IN THIS. WE HAVE TO KNOW THAT THIS JUST ISN'T A
10 FISHING EXPEDITION," AND YOU, AS THE GUY WHO'S PROSECUTING
11 THIS CASE, NEVER GETS TO FIGURE OUT THEIR THEORY?

12 IN EFFECT, I ERECT ONE OF THE WALLS BETWEEN
13 GOVERNMENT AGENCIES. THAT'S FAIRLY COMMON EVEN WITHIN
14 PROSECUTORS' OFFICES WHERE AN OFFICE IS ALLOWED TO CONTINUE ON
15 A CASE, ALTHOUGH SOMEBODY MIGHT BE DISQUALIFIED WITHIN THE
16 OFFICE. YOU ERECT ONE OF THESE WALLS.

17 IN EFFECT, I'VE DONE THAT. AND I THINK THAT'S
18 CONSTANT WITH BOTH WHAT I REGARD AS MR. FOGGO'S FAIR TRIAL
19 RIGHTS AND STILL HAS FIDELITIES TO THE CIPA PROCEDURES AND THE
20 FACT THAT THIS INFORMATION WAS VERY DIFFERENT IN TIME FROM
21 MOST OF WHAT IS DISSEMINATED AND GIVEN OVER IN CRIMINAL CASES.

22 MR. HALPERN: I'M GOING TO ASK MR. MCPHERSON TO TELL
23 YOU WHY THIS IS IMPRACTICAL, TO THE EXTENT HE BELIEVES IT IS.
24 BECAUSE NUMBER ONE, FROM OUR POINT OF VIEW, IT, IN SOME
25 REGARDS, HAMPERS THIS DECISION BY MR. MCPHERSON. HE'S THE

1 INDIVIDUAL WHO HAS TO MAKE IT. AND I CAN TELL YOU FROM PRIOR
2 DISCUSSIONS WITH THEM THE VIEW WE HAVE AS TO WHAT INFORMATION
3 SHOULD GO TO THE DEFENSE IS GREATER, PERHAPS, IN SOME RESPECTS
4 BECAUSE WE KNOW OUR CASE IN A WAY THAT MR. MCPHERSON WILL
5 NEVER KNOW OUR CASE.

6 AND THE FACT OF THE MATTER IS THAT MR. MCPHERSON
7 MAKES IT. HE WILL DO THE BEST JOB HE CAN DO. HE'S NOT A
8 MASTER OF RULE 16. HE DOESN'T KNOW OUR TRIAL STRATEGY. HE
9 DOESN'T KNOW EVERY WITNESS WE'RE GOING TO BE CALLING. HE
10 DOESN'T KNOW WHAT COULD, IN FACT, BE BRADY AND WHAT ISN'T.
11 BUT HE'S AN EXCELLENT LAWYER. HE'LL DO AN EXCELLENT JOB.

12 I'LL TELL YOU THIS: THEY MAY NOT LIKE THE RESULTS.
13 IF THEY'RE HAPPY WITH THAT, I HAVE NO DOUBT THAT THE COURT
14 WILL BE ON SOUND FOOTING SAYING HIS DECISIONS ARE ARBITRARY.
15 HE DOESN'T KNOW EVERYTHING. WE'RE GOING TO LOSE OUT. THAT'S
16 WHAT I SEE AS A PROBLEM; ASKING HIM -- PUTTING HIM IN AN
17 IMPOSSIBLE POSITION. BUT HE REALLY SHOULD ADDRESS THIS
18 BECAUSE I DON'T BELIEVE HIS POSITION IS THAT HE SHOULD DO
19 THAT, HE SHOULD BE ABLE TO REPRESENT THE UNITED STATES FULLY.

20 THE COURT: MR. MCPHERSON, I'M HAPPY TO HEAR FROM
21 YOU. I MEAN, THE BACKDROP TO ALL THIS -- I'M GOING TO SAY ONE
22 MORE THING.

23 THE BACKDROP TO ALL THIS IS, I SUPPOSE, IF HE
24 DISAGREES, I WANTED TO CUT TO THE CHASE A WHILE AGO AND SAY,
25 "OKAY. MR. MCPHERSON AND MR. MAC DOUGALL, COME IN WITH ME.

1 MR. MAC DOUGALL, TELL ME WHAT YOU TOLD HIM IN PRIVATE SESSION.
2 GIVE ME THE PROFFER ON RELEVANCE. I'LL MAKE A DETERMINATION
3 BASED ON MY UNDERSTANDING OF RELEVANCE PRINCIPLES AND
4 RULE 16."

5 IF YOU DISAGREE WITH THAT, YOU CAN SAY, "NOPE, WE'RE
6 STILL NOT DOING IT. WITH ALL RESPECT, WE'RE NOT DOING IT.
7 WE'RE GOING TO PURSUE OUR APPELLATE RIGHTS."

8 YOU HAVE AN IMMEDIATE RIGHT TO APPEAL IF I ORDER THE
9 DISSEMINATION OR PRODUCTION OF INFORMATION YOU DISAGREE WITH;
10 RIGHT?

11 MR. HALPERN: WE MIGHT. BUT THE FACT OF THE MATTER
12 IS THE COURT, AGAIN, IS MAKING THE DECISION WITHOUT ANY
13 UNDERSTANDING FROM THE GOVERNMENT'S PROSECUTORS OF WHY IT
14 ISN'T RELEVANT. AGAIN, YOU HAVE TO REALLY KNOW THE CASE.
15 YOU'RE DOING IT WITH ONE SIDE, THE EXACT DECISIONS YOU'RE
16 GOING TO HAVE TO MAKE AT TRIAL WITH ONLY ONE SIDE. IT'S JUST
17 DIFFICULT FOR THE COURT.

18 LET ME GIVE YOU AN EXAMPLE, YOUR HONOR. WE HAD NO
19 KNOWLEDGE OF THE S.C.I.F. ISSUE. THIS IS GOING TO APPEAR TO
20 BE FUNNY BECAUSE IT'S A SIDE ISSUE, BUT I THINK IT MAKES THE
21 POINT. WE HAD NO KNOWLEDGE THAT THE COMMUNICATIONS BEFORE THE
22 COURT SAID SOMETHING -- HAD TO DO WITH THE S.C.I.F. AND I'VE
23 BEEN GOING OUT OF MY WAY. I'D LIKE TO REPORT BACK ON THAT,
24 ALSO.

25 THE COURT: AVAILABILITY?

1 MR. HALPERN: ON THE AVAILABILITY.

2 I'VE GONE OUT OF MY WAY TRYING TO KILL MYSELF TO
3 MAKE THIS HAPPEN WHERE ONCE WE UNDERSTOOD THAT THERE WAS
4 COMMUNICATION WITH THE COURT AND ABOUT THE AVAILABILITY OF
5 S.C.I.F. IN WASHINGTON, HOW COULD WE GET ONE, WE STARTED TO
6 INVESTIGATE.

7 I MUST SAY IT DID TAKE SOMEWHERE BETWEEN 30 SECONDS
8 AND A MINUTE AND GOOGLE BEFORE WE COULD FIND A S.C.I.F. TO
9 RENT IN WASHINGTON. I WOULD POINT MR. MAC DOUGALL TO GOOGLE.
10 IT'S A SEARCH ENGINE POPULARLY USED. AND IF HE PUTS IN
11 "WASHINGTON," "RENT," AND "S.C.I.F.," HE'LL BE ABLE TO GET A
12 S.C.I.F. TO RENT, IF THAT'S WHAT HE WANTS TO DO. AT LEAST WE
13 FOUND SOME.

14 AND WHILE THAT'S OFF-POINT, IT JUST SHOWS THE COURT
15 THE DIFFICULTY WHEN YOU'RE ONLY GETTING ONE SIDE. AND WHILE
16 THAT'S A TRIVIAL MATTER, WHERE WE'RE TALKING ABOUT RELEVANCE
17 AT TRIAL, NOW, AGAIN, THIS COURT CAN MAKE THOSE DETERMINATIONS
18 AS GOOD AS ANY COURT THAT THERE IS, BUT WITHOUT HAVING BOTH
19 SIDES ARGUE, IT'S VERY DIFFICULT.

20 THE COURT: WELL, I DON'T THINK IT'S AS DIFFICULT AS
21 YOU MAKE IT OUT TO BE. I'M ARMED WITH THE INDICTMENT. I'M
22 ARMED WITH SPECIFIC ALLEGATIONS THAT THE GOVERNMENT MAKES IN
23 THE INDICTMENT. THE GRAND JURY HAS FOUND PROBABLE CAUSE TO
24 BELIEVE THAT THOSE THINGS ARE TRUE.

25 NOW, THOUGH I KNOW AT LEAST WHAT THE ACCUSATIONS

1 ARE, I MAY NOT BE COMPLETELY CONVERSANT -- IN FACT, I'LL BE
2 THE FIRST TO ADMIT THAT I'M NOT -- WITH WHAT YOUR PROOF IS
3 GOING TO BE, BUT AT LEAST I KNOW WHAT THE ALLEGATIONS ARE.

4 NOW, THIS SEEMS TO ME NO DIFFERENT FROM THE EX PARTE
5 PROCEEDING THAT'S SPECIFICALLY AUTHORIZED BY RULE 16 WHEN
6 THERE'S SOME QUESTION ABOUT RELEVANCY. AND THE GOVERNMENT, IN
7 AN EX PARTE PROCEEDING, SAYS -- WELL, BRADY, FOR EXAMPLE, "WE
8 DON'T THINK THIS IS BRADY, BUT WE WANT YOU TO PUT YOUR
9 IMPRIMATUR ON IT, JUDGE." THE DEFENSE HAS NO SAY IN THAT.
10 THE THINGS ARE SUBMITTED TO THE JUDGE IN CAMERA. HE LOOKS
11 DOWN AND SAYS "I AGREE WITH YOU. I DON'T THINK IT'S BRADY
12 EITHER," AND THEN IT'S NEVER PRODUCED. THAT'S A COMPLETELY
13 ONE-SIDED PROCEEDING THAT GETS NO INPUT FROM THE DEFENSE.

14 HERE I FIND MYSELF IT'S THE FLIPSIDE OF THE COIN. I
15 HAVE AN ACCUSATION. I KNOW WHAT THE GOVERNMENT ALLEGES. AND
16 THEN I HAVE A TRAINED LAWYER WHO IS GOING TO SAY, "LOOK,
17 HERE'S WHAT THEY'RE ACCUSING ME OF. HERE'S WHY WE THINK THIS
18 INFORMATION IS RELEVANT TO HIS DEFENSE. WE DON'T WANT THE
19 GOVERNMENT TO KNOW WHAT WE'RE THINKING, WHAT DEFENSE WE'RE
20 GOING TO PURSUE. BUT THIS IS WHY WE NEED THIS INFORMATION."

21 NOW, WHY CAN'T I MAKE THAT ASSESSMENT IN AN EX PARTE
22 PROCEEDING? APPARENTLY, MR. MAC DOUGALL'S GOING TO DO IT IN
23 FRONT OF MR. MCPHERSON BECAUSE HE'S MADE THAT CLAIM TO MR. MC
24 PHERSON IN THE FIRST INSTANCE.

25 MR. HALPERN: I THINK YOU CAN, IN SOME INSTANCES,

1 YOUR HONOR. THE EASY ONES ARE EASY WHETHER IT'S BRADY OR
2 THIS. IT'S THE HARD ONES THAT -- I WANT MR. MCPHERSON TO
3 ADDRESS THAT. BUT BEFORE I LET HIM ADDRESS IT, I JUST WANT
4 THE COURT TO KNOW THIS IS NOT ABOUT GAINING A TACTICAL
5 ADVANTAGE. WE'RE GOING TO FIND THIS OUT ANYWAY.

6 THE COURT: MR. HALPERN, LOOK, I KNOW THAT. YOU'RE
7 TOO GOOD AND TOO EXPERIENCED A LAWYER TO TRY TO GET A CHEAP
8 ADVANTAGE HERE. I UNDERSTAND THAT REALLY THIS IS ABOUT
9 PRINCIPLES THAT -- AND PRECEDENTS THAT YOU'RE CONCERNED ABOUT
10 SETTING HERE.

11 ONE OTHER THING: I MEAN, I THINK MR. -- YOU'RE
12 TALKING ABOUT WHO'S IN THE BEST POSITION TO KNOW.
13 MR. MCPHERSON IS IN A MUCH BETTER POSITION, I DARE SAY, THAN
14 YOU TO KNOW WHY THIS INFORMATION OUGHT TO REMAIN CLASSIFIED,
15 WHAT THE INTEREST OF THE UNITED STATES IS IN KEEPING IT SUPER
16 SECRET. YOU AND I PROBABLY HAVE SOME IDEA ABOUT IT, BUT HE
17 KNOWS FIRSTHAND.

18 SO WHO BETTER TO INFORM ME AND THE CIA
19 REPRESENTATIVE AND THE REPRESENTATIVE OF THE DEFENSE IN
20 THIS.

21 MR. HALPERN: THERE'S NO QUESTION HE HAS TO BE PART
22 OF THE PROCESS BECAUSE HE DOES REPRESENT --

23 THE COURT: I THINK IN THAT RACE, THE U.S. ATTORNEY
24 COMES IN THIRD. I DON'T KNOW WHICH ONE OF THESE GUYS WINS IN
25 TERMS OF WHO'S GOT THE MOST IMPORTANT INPUT. I THINK I'D LOOK

1 TO YOU THIRD FOR INPUT AFTER I SAID, "OKAY. WHY IS THIS
2 RELEVANT?" THEN I'D TURN TO HIM AND SAY, "TELL ME WHY THIS IS
3 SO COMPELLING THAT DESPITE ITS RELEVANCE IT SHOULDN'T BE
4 TURNED OVER."

5 MR. HALPERN: THERE'S NO QUESTION AS FAR AS THE
6 COMPELLING NATURE OF IT, THE FACT OF WHY IT'S A HIGHLY
7 CLASSIFIED SECRET, WHY IT SHOULDN'T BE TURNED OVER.

8 MR. MCPHERSON IS THE INDIVIDUAL. ALL I WOULD BE DOING WOULD
9 BE TALKING TO MR. MCPHERSON AND GIVING IT TO YOU.

10 HOWEVER, AS TO THE RELEVANCE, THE EASY ONES ARE
11 EASY. IF IT'S RIGHT IN THE INDICTMENT, OF COURSE I DON'T
12 HAVE TO KNOW ABOUT IT. I DON'T KNOW WHAT'S SO SECRET ABOUT IT
13 TO SAY, "OH, WE WANT TO ASK ABOUT THIS QUESTION THAT IS ON
14 LINE 12 OF YOUR INDICTMENT." NOBODY'S GOING TO OBJECT. I'M
15 SURE HE DIDN'T.

16 WE'RE GETTING TO THE AREA HERE WHERE I'M ASSUMING
17 THE AREAS THEY'RE ASKING ABOUT ARE NOT WITHIN THE FOUR CORNERS
18 OF THE INDICTMENT. IF THEY WERE, MR. MCPHERSON WOULD HAVE
19 APPROVED THEM ALREADY. AGAIN, I DON'T KNOW WHAT HE DID OR
20 DIDN'T.

21 THE COURT: IT'S VERY EASY FOR BOTH OF US TO
22 ENVISION A SITUATION WHERE MR. MAC DOUGALL, BY PRESENTING
23 INFORMATION TO YOU, WOULD COMPROMISE MR. FOGGO'S DEFENSE.
24 MAYBE THEY KNOW SOMETHING YOU DON'T KNOW. MAYBE A WITNESS HAS
25 MADE SOME INCONSISTENT STATEMENT AND THEY HAVE SOUND PROOF OF

1 THAT AND WHEN CONFRONTED WITH IT, THE WITNESS WILL ADMIT IT.

2 AND IF HE HAS TO TELL YOU THAT THAT'S THE REASON
3 THEY WANT TO TALK TO THIS FELLOW, THEN YOU SAY "WE'RE NOT
4 USING THIS GUY. HE'S DAMAGED GOODS. WE'RE NOT GOING TO PUT
5 HIM ON ANYMORE. WE'VE GOT TO FIND ANOTHER WAY TO PROVE THIS,"
6 WHICH SOLIDIFIES THE CASE AGAINST MR. FOGGO AND RUNS
7 COMPLETELY CONTRARY TO FOGGO'S PRIVILEGE AGAINST
8 SELF-INCRIMINATION, HIS FAIR TRIAL RIGHTS UNDER THE 6TH
9 AMENDMENT. HE DOESN'T HAVE TO SHOW HIS HAND BEFOREHAND. AND
10 HE'S ALLOWED TO USE THE ADVANTAGE OF SURPRISE AND ALLOWED NOT
11 TO SHARE WITH YOU WHAT HE COMES UP WITH IN HIS INVESTIGATION
12 THAT'S COMPLETELY CONTRARY TO PERHAPS YOUR UNDERSTANDING OF
13 WHAT YOU'VE BEEN TOLD UP TO THIS POINT.

14 I THINK THE SIMPLE WAY TO ACCOMMODATE THAT INTEREST
15 AND AT THE SAME TIME PRESERVE THE INTEREST OF THE UNITED
16 STATES IS TO HAVE ME MEET WITH THE CIA FELLOW -- AS YOU SAY,
17 ALL YOU'D BE IS THE SPOKESMAN AND THE MIDDLEMAN ANYWAY. I'M
18 ALL IN FAVOR, IN MOST CONTEXTS IN MY LIFE, OF CUTTING THE
19 MIDDLEMAN OUT. WHEN I BUY A CAR, I GO RIGHT TO THE SALES
20 MANAGER. I DON'T USE THE SALESMEN ANYMORE BECAUSE I KNOW THAT
21 MEANS COMMISSION.

22 MR. HALPERN: I APPRECIATE WHAT THE COURT IS TRYING
23 TO DO IN TERMS OF GETTING A RULING AND MOVING THE THING ALONG.
24 I'M HERE AS THE SPOKESPERSON FOR THE CIA REPRESENTING THE
25 DIFFICULTY THEY HAVE. I'M GOING TO LET MR. MCPHERSON SPEAK TO

1 THAT IN A SECOND.

2 BUT AGAIN, LOOKING BACK AT THE COURT'S POINT, WHILE,
3 AGAIN, I DON'T QUARREL WITH WHAT YOU'RE SAYING, WE BOTH
4 RECOGNIZE THERE ARE NUMEROUS EXAMPLES WHERE THE DEFENSE DOES,
5 IN FACT, HAVE TO COME FORWARD. THIS IS BUT ONE OF 50 -- WELL,
6 MAYBE NOT 50 -- A DOZEN AT LEAST THAT COULD COME UP HAVING TO
7 DO WITH GIVING AN INSANITY DEFENSE, HAVING TO USE A NATIONAL
8 NECESSITY CLAIM. THERE ARE MANY TIMES AT TRIAL WHERE THEY
9 HAVE TO GIVE NOTICE. EXPERTS. THEY HAVE TO TIP OFF THE OTHER
10 SIDE. THIS IS PART OF OUR PROCESS.

11 WHEN WE'RE THROWN INTO THE WORLD OF CLASSIFIED
12 INFORMATION, THAT'S ONE OF THESE WHERE IT CHANGES THE RULES A
13 BIT. AND MY JOB HERE IS JUST TO MAKE SURE THOSE RULES ARE
14 FOLLOWED, TO MAKE SURE THAT THE CIA CAN DO THEIR JOB.

15 IF MR. MCPHERSON HAD NO TROUBLE MAKING THE DECISION,
16 THAT ENDS IT. BUT ONCE WE GO DOWN THAT ROAD, AS FAR AS I
17 LOOKED AT THE LAW -- I HAVEN'T SEEN THE BRIEFING -- HE'S MADE
18 THOSE DECISIONS. IF THEY QUARREL WITH HIM, THERE'S AN
19 ACCEPTED PROCEDURE IN THE 9TH CIRCUIT AND EVERY OTHER
20 PROCEDURE. THEY CAN GO FOLLOW THAT PROCEDURE. I HAVEN'T READ
21 THE BRIEFINGS BY THE DEFENSE. WHEN I LOOKED AT THE GOVERNMENT
22 CASES, IT LOOKED COMPLETELY CLEAR TO ME THAT'S THE WAY TO GO.

23 SO AGAIN, I AM AN OFFICER. I WOULD NEVER URGE THAT
24 THE COURT, EVEN OUT OF EXPEDIENCY, FOLLOW A PATH THAT IS NOT
25 CONSISTENT WITH THE WAY THESE CASES ARE.

1 AGAIN, YOU'VE HEARD BOTH BRIEFS. IF YOU'RE
2 CONVINCED THAT YOU'RE RIGHT AND THE 9TH CIRCUIT, THE EXXON, I
3 SAY FINE. I HAVEN'T READ THE OTHER SIDE. IF I READ THE OTHER
4 SIDE, MAYBE I'D BE IN HERE SAYING, "WELL, MR. MAC DOUGALL HAS
5 A POINT." BUT I HAVEN'T READ THE OTHER SIDE. I'VE READ ONE
6 SIDE OF THE CASES. THEY LOOK VERY CLEAR TO ME.

7 THE COURT: YOU BELIEVE HIS RECOURSE NOW IS TO FILE
8 A LAWSUIT UNDER THE ADMINISTRATIVE PROCEDURES ACT?

9 MR. HALPERN: THAT'S CERTAINLY TO OBJECT TO THE
10 TOUHY DECISIONS. THAT IS CLEARLY IT. NOW, IF HE WANTS TO
11 THROW THIS BACK INTO DISCOVERY, IF HE WANTS -- YOU KNOW,
12 MR. MAC DOUGALL, IN FACT, ASKED ME FOR ONE BIT OF INFORMATION
13 THAT WE DIDN'T PROVIDE IN DISCOVERY. I WROTE HIM A LETTER
14 BACK SAYING, "YOU KNOW, LET ME LOOK INTO IT."

15 I HAVE BEEN LOOKING INTO IT. I'VE BEEN COMPILING
16 IT. IT'S NOT QUITE YET DONE, BUT IT'S ALMOST DONE. HE'S
17 GOING TO GET IT. I LOOKED AT IT AND I SAID, "WELL, HE HAS A
18 RIGHT TO HAVE IT." WE'RE WORKING ON IT. WE'RE GOING TO GET
19 HIM THE INFORMATION. IT HAS TO DO WITH CONTRACT AMOUNTS AND
20 SOME OTHER THINGS THEY WANTED. THAT'S THE NORMAL WAY THESE
21 THINGS ARE DONE. AND THEN IF HE WANTS TO --

22 THE COURT: WERE YOU ALERTED TO THIS EXXON CASE
23 BEFORE YOU CAME IN?

24 MR. HALPERN: NO.

25 THE COURT: LET ME READ YOU --

1 MR. HALPERN: THE EXXON CASE -- PART OF IT, YOUR
2 HONOR -- WE CITED IT. BUT IN TERMS OF HIS ARGUMENT ON IT, I
3 MUST TELL THE COURT I'M NOT FAMILIAR WITH THE DETAILS OF IT.
4 BUT MR. MCPHERSON IS.

5 THE COURT: THE LEGAL ISSUE THAT THE DEFENSE HAS
6 RAISED IS ESSENTIALLY THE 9TH CIRCUIT HAS SAID IN A DIFFERENT
7 CONTEXT THAN A CIVIL SUIT THAT THERE'S -- NOTWITHSTANDING THE
8 AVAILABILITY OF THE ADMINISTRATIVE PROCEDURES ACT APPEAL, THAT
9 WHEN A CASE IS IN FRONT OF THE DISTRICT COURT AND INVOLVES THE
10 UNITED STATES AS A PARTY, THAT THE DISTRICT COURT, IN THE
11 FIRST INSTANCE, MAY MAKE THE DETERMINATIONS THAT WOULD
12 OTHERWISE BE MADE IN AN APA CIVIL SUIT.

13 AND THE DEFENSE QUOTES IT HERE FROM PAGE 779. IT'S
14 AT 34 FED. 3D 779. THE 9TH CIRCUIT IN EXXON EXPLICITLY
15 DISCARDED THE REMEDY SUGGESTED BY THE GOVERNMENT IN THIS CASE,
16 A CIVIL SUIT UNDER APA. QUOTE, "COLLATERAL APA PROCEEDINGS
17 CAN BE COSTLY, TIME-CONSUMING, INCONVENIENT TO LITIGANTS, AND
18 MAY EFFECTIVELY EVISCERATE ANY RIGHT TO THE REQUESTED
19 TESTIMONY," END QUOTE. THUS, QUOTE, "THE NEED FOR DISTRICT
20 COURT REVIEW AND SUCH INSTANCES IS ALL THE MORE COMPELLING,"
21 END QUOTE.

22 AGAIN, CONTEXT IS IMPORTANT. THIS IS A CIVIL SUIT.
23 BUT THE ISSUE IN EXXON IS THE SAME AS THE ONE BEING PRESENTED
24 TO ME, WHICH IS "YOU'RE INVOLVED IN THIS CASE, AND THE UNITED
25 STATES IS A PARTY. AND THESE ARE THE TYPES OF DETERMINATIONS

1 YOU'RE MAKING ANYWAY. YOU'RE GOING TO BE CALLED ON TO MAKE
2 THESE DETERMINATION UNDER SECTION 5. MAKE THEM. MAKE THEM.
3 DON'T MAKE US FILE A LAWSUIT. WHO KNOWS HOW LONG THAT'S GOING
4 TO TAKE. IT COULD BE A YEAR."

5 AND WHAT WOULD I HAVE TO DO? I THINK NECESSARILY
6 I'D HAVE TO STAY THIS CRIMINAL CASE WHILE THAT WAS PENDING.
7 AND WHO'S TO SAY THAT THIS IS GOING TO BE THE ONLY DISPUTE.
8 LET'S SAY THAT THE INVESTIGATION TAKES ANOTHER TURN AND THEY
9 COME TO MR. MCPHERSON AND HE SAYS, "I DON'T SEE IT HERE."
10 THEN THEY'VE GOT TO FILE ANOTHER SUIT. WE COULD BE HELD UP
11 INDEFINITELY.

12 I'M BUFFETED BECAUSE I'VE GOT TWO GUYS THAT HAVE NOT
13 WAIVED THEIR SPEEDY TRIAL RIGHTS. ONE GUY HAS BEEN FAIRLY
14 INSISTENT THAT HE WANTS TO GET THIS RESOLVED QUICKLY. HE
15 HASN'T FIRMLY ASSERTED AND SAID, "GIVE ME A RIGHT TO TRIAL IN
16 70 DAYS."

17 BUT YOU KNOW FROM HEARING MR. WILKES SEVERAL TIMES
18 HE DOESN'T LIKE THE CIRCUMSTANCES NOW. HE WANTS A RESOLUTION
19 OF THIS. HE BELIEVES HE'S GOING TO BE VINDICATED. IF I
20 BELIEVED THAT, THEN I WOULD WANT A SPEEDY RESOLUTION, TOO.
21 I'D WANT TO CLEAR MY NAME.

22 SO I'M TRYING TO ACCOMMODATE THAT INTEREST. I THINK
23 THAT'S MY RESPONSIBILITY HERE. TO SAY WE'RE GOING TO GO DOWN
24 THIS PATH AND I'M GOING TO TURN THIS WHOLE THING OVER TO SOME
25 MAN OR WOMAN FOR WHOM I HAVE RESPECT, THAT THEY'RE GOING TO

1 HAVE TO COME UP TO SPEED AND SAY, "OKAY. WHAT'S THIS ABOUT?
2 LET ME GET THE INDICTMENT. LET ME SEE THIS." I DON'T KNOW
3 THAT YOU WOULD HAVE ANY SAY IN THAT PROCEEDING, WOULD YOU?

4 MR. HALPERN: WE WOULD, ACTUALLY, YOUR HONOR.

5 THE COURT: YOU PERSONALLY OR --

6 MR. HALPERN: PROBABLY. WELL, SOMEBODY FROM THE
7 PROSECUTION TEAM. BUT TWO THINGS, IF I COULD.

8 FIRST, I'D LIKE -- SECONDLY, I'D LIKE MR. MCPHERSON
9 TO TALK ABOUT EXXON BECAUSE I DO THINK IT'S VERY
10 DISTINGUISHABLE. HE BRIEFED IT. HE UNDERSTANDS IT. THAT'S
11 HIS ARGUMENT.

12 BEFORE WE GET THERE, I DON'T MEAN TO BUSHWHACK THE
13 COURT WITH THIS FACT. I JUST LEARNED OF IT YESTERDAY EVENING.
14 MR. GERAGOS -- OR MR. WILKES, ON HIS BEHALF, HAS SEEMINGLY
15 TAKEN A NEW POSITION AND A NEW TACT. I WAS SOMEWHAT SURPRISED
16 BECAUSE HE CLEARLY -- HE CALLED ME UP LATE, AND WE HAD A BRIEF
17 CONVERSATION. AND LET ME SAY HE MISUNDERSTOOD WHAT I SAID.
18 AND HE MADE A FILING WHICH ATTEMPTED TO INDICATE THAT THE
19 GOVERNMENT WOULD SOMEHOW AGREE TO A CONTINUANCE. BUT HE'S
20 SEEKING A CONTINUANCE NOW. THE GOVERNMENT IS READY TO TRY
21 THIS CASE WHENEVER THE COURT WANTS TO.

22 THE COURT: I'M READY TO TRY THE FIRST CASE ON
23 SEPTEMBER 18TH. I'VE READ HIS PLEADING, AND I'M PREPARED TO
24 RESPOND TO IT.

25 MR. HALPERN: ASIDE FROM THAT, LET MR. MCPHERSON

1 ADDRESS THE EXXON VALDEZ BECAUSE I THINK THIS IS INSTRUCTIVE
2 FOR THE COURT.

3 THE COURT: MR. MCPHERSON.

4 MR. MCPHERSON: THANK YOU, YOUR HONOR.

5 FIRST, I'D LIKE TO ADDRESS THE HOLDING OF THE EXXON
6 CASE AND THEN ADDRESS MORE BROADLY THE LEGAL REGIME THAT
7 APPLIES TO DISPUTES OF THIS VARIETY.

8 COUNSEL FOR DEFENDANT FOGGO MISAPPREHENDS THE
9 HOLDING IN THE EXXON CASE. IMMEDIATELY AFTER THE QUOTED
10 MATERIAL THAT THE COURT JUST READ INTO THE RECORD HERE, THE
11 NEXT LINE, THE COURT TALKS ABOUT "WE BELIEVE THAT FEDERAL
12 DISTRICT COURTS IN REVIEWING SUBPOENAS," OKAY? SO THE CONTEXT
13 HERE IS THIS IS A CIVIL SUBPOENA FOR THE DEPOSITION OF FEDERAL
14 EMPLOYEES. THAT MEANS THAT EXXON IN THAT CASE HAS JOINED THE
15 ISSUE WITH THE U.S. ATTORNEY'S OFFICE REPRESENTING THE
16 INTERESTS OF THE UNITED STATES WITH DISCOVERY REQUESTS AND A
17 CIVIL SUBPOENA.

18 IT'S A FAR CRY FROM THE SITUATION WE HAVE HERE WHERE
19 MR. HALPERN IS GIVING HIS BEST EFFORT TO RESPOND TO ARGUMENTS
20 THAT HE HAS NEVER SEEN. SO THAT'S A FUNDAMENTAL DIFFERENCE
21 HERE AS WELL. AND EXXON STANDS FOR THE SAME PROPOSITION. IF
22 THIS IS IN THE CONTEXT OF A DISCOVERY REQUEST, WHETHER CIVIL
23 OR CRIMINAL, THEN WE HAVE A LEGAL REGIME THAT APPLIES; THE
24 RULES OF CIVIL PROCEDURE OR THE RULES OF CRIMINAL PROCEDURE.

25 IN THAT CASE, WE AGREE WITH THE 9TH CIRCUIT, AND WE

1 AGREE WITH YOUR HONOR THAT THAT WOULD BE TIME-CONSUMING,
2 DUPLICITOUS, AND WASTEFUL TO EMPLOY AN APA -- A COLLATERAL
3 PROCEEDING UNDER THE APA.

4 THE COURT: MR. MAC DOUGALL IS NOW AWARE OF --
5 IS IT SEVEN, THE NUMBER OF EMPLOYEES OR FORMER
6 EMPLOYEES WHO ARE WILLING TO SPEAK?

7 MR. MCPHERSON: YES.

8 THE COURT: WHAT IF TOMORROW HE TURNS AROUND AND
9 SAYS, "FINE. HERE'S A SUBPOENA. I WANT YOUR TESTIMONY" OR "I
10 WANT TO TALK TO YOU. BE AT THIS PLACE AT THIS TIME," RULE 17
11 TYPE SUBPOENA?

12 MR. MCPHERSON: THE CASE LAW IS CLEAR THAT HE HAS NO
13 RIGHT TO COMPEL THE ATTENDANCE OF WITNESSES BEFORE TRIAL.

14 THE COURT: WHAT IF HE SUBPOENAS THEM FOR
15 INFORMATION OR PROPOUNDS INTERROGATORIES TO THEM THAT ASKS THE
16 SAME QUESTIONS THAT HE WOULD OTHERWISE ASK AND TELLS THEM "BE
17 DISCRETE ABOUT THIS. RETURN IT JUST TO ME"? DOES THAT PUT
18 HIM CLOSER TO THE EXXON SITUATION OR TO HAVE SOME KIND OF
19 LEGAL PROCESS WHERE THE ISSUE IS JOINED?

20 MR. MCPHERSON: NO. SUPREME COURT 9TH CIRCUIT CASE
21 LAW IS CLEAR THAT HE HAS NO RIGHT TO DEMAND THAT AND THIS
22 COURT HAS NO RIGHT TO COMPEL ANY COOPERATION WHATSOEVER BY THE
23 WITNESS. IT'S SOLELY UP TO THE DISCRETION OF THE WITNESS, NO
24 IMPROPER INFLUENCE BY THE GOVERNMENT, AND NO DEMAND BY THE
25 DEFENSE IN COMPELLING.

1 THE COURT: AT THE END OF THE DAY, I UNDERSTAND THE
2 DISTINCTIONS THAT YOU'RE POINTING OUT. WHAT WE HAVE IS A
3 REQUEST FOR WHAT THEY BELIEVE TO BE RELEVANT INFORMATION IN
4 THIS CASE. AND IN EXXON, I'M ASSUMING THAT IN GOOD FAITH THE
5 SUBPOENAS WERE ISSUED. AND SO THEY BELIEVED IT WAS RELEVANT
6 INFORMATION, INFORMATION ABOUT A CLAIM OR RELEVANT TO A CLAIM
7 ITSELF.

8 MR. MCPHERSON: REMEMBER, EXXON WAS JUST SUCH A
9 CASE. IT WAS A COLLATERAL CIVIL PROCEEDING. REMEMBER, EXXON
10 WAS THE DEFENDANT IN THE ORIGINAL UNDERLYING DAMAGES LAWSUIT.
11 AND WHEN THE GOVERNMENT, THROUGH THEIR TOUHY REGULATIONS,
12 DENIED ACCESS TO THE EMPLOYEES TO BE WITNESSES IN CIVIL
13 DEPOSITIONS, EXXON HAD TO FILE A SEPARATE CIVIL ACTION IN THE
14 COURT TO HAVE THE ISSUE EVEN HEARD.

15 I WOULD LIKE TO POINT OUT MOST IMPORTANTLY THE COURT
16 HERE IS STRUGGLING WITH WHAT STANDARD TO REVIEW THE CIA
17 DECISION, WHAT LEVEL OF DEFERENCE TO APPLY. AND THAT'S
18 UNDERSTANDABLE BECAUSE DEFENSE COUNSEL HAS NOT ARTICULATED ANY
19 LEGAL STANDARD WHICH APPLIES. AND MR. MAC DOUGALL SUGGESTED
20 THE COURT SHOULD REVIEW WHETHER THE APA'S ACTION WAS
21 REASONABLE. WITH ALL DEFERENCE TO THE COURT, THE COURT
22 DOESN'T SIT AS A CHANCELLOR ROAMING THE COUNTRY TRYING TO --

23 THE COURT: I AGREE. I DON'T THINK I WOULD HAVE
24 SUCH A NON-DEFERENTIAL STANDARD WITH YOU. AS I SAID, YOU KNOW
25 A LOT MORE ABOUT WHY THESE THINGS MUST BE KEPT SECRET THAN I

1 COULD EVER GLEAN OR HOPE TO IMAGINE. I WOULD TEND TO BE MORE
2 DEFERENTIAL.

3 WHAT'S THE STANDARD ON APA REVIEW?

4 MR. MCPHERSON: ARBITRARY AND CAPRICIOUS AGENCY
5 ACTION.

6 THE COURT: CAN'T I MAKE THAT DETERMINATION? LET'S
7 SAY I EMBRACE THAT STANDARD AND SAY, "YEAH, I THINK IT'S
8 RELEVANT. BUT ON THE OTHER HAND, THIS DOESN'T RISE TO THE
9 LEVEL OF BEING ARBITRARY AND CAPRICIOUS ON THE CIA'S PART.
10 THEY MAY BALANCE SOME RELEVANCY, BUT THEY STILL HAVE
11 COMPELLING INTEREST THAT SUPERSEDES THIS. SO I'M NOT GOING TO
12 ALLOW IT. I DON'T THINK IT'S ARBITRARY FOR THEM TO SAY NO
13 GIVEN WHAT MR. MCPHERSON'S TELLING ME." WHY CAN'T I DO THAT?
14 THAT CUTS OUT WHAT I BELIEVE TO BE A VERY LENGTHY,
15 COMPLICATED, CUMBERSOME PROCEDURE.

16 MR. MCPHERSON: I WOULD HOPE THE COURT WOULD NOT
17 REACH SUCH A CONCLUSION WITHOUT BEING HEARD BY THE GOVERNMENT.
18 THAT'S THE ESSENCE OF OUR POSITION HERE; THAT THE DEFENDANT
19 DID, FOR TACTICAL REASONS OR OTHERWISE -- AND IT'S NOT OUR JOB
20 TO SECOND-GUESS -- HAS TWO PATHS AVAILABLE TO HIM. HE WANTS
21 TO OBTAIN CLASSIFIED INFORMATION FROM THE GOVERNMENT. HE CAN
22 OBTAIN THAT THROUGH ORAL INTERVIEWS OF CIA EMPLOYEES OR
23 DISCOVERY DEMANDS PROPOUNDED UPON THE GOVERNMENT REPRESENTED
24 BY THE UNITED STATES ATTORNEY'S OFFICE HERE IN THE SOUTHERN
25 DISTRICT OF CALIFORNIA.

1 FOR WHATEVER REASON, NOT OURS TO SECOND-GUESS, HE'S
2 CHOSEN TO GO THE FIRST ROUTE THROUGH A TOUHY DEMAND TO THE
3 CIA. THAT RAISES THE QUESTION FOR THE COURT, WHETHER IT'S
4 TOUHY OR DISCOVERY, WHO DECIDES IN THE FIRST INSTANCE AND WHAT
5 JUDICIAL OFFICIAL, IF ANY, REVIEWS THAT AND UNDER WHAT
6 STANDARD. IF YOU GO FOR A TOUHY REQUEST, IT'S DECIDED BY THE
7 DIRECTOR OF THE CIA, AND THE REVIEW IS UNDER THE
8 ADMINISTRATIVE PROCEDURES ACT FOR AN ARBITRARY OR CAPRICIOUS
9 ACTION.

10 THE COURT: WHAT HAPPENS -- I'M UNFAMILIAR WITH IT.
11 SO THE NEXT STEP WOULD BE TO GO TO THE DIRECTOR OF THE CIA,
12 AND MR. MAC DOUGALL WOULD HAVE TO MAKE THE CASE --

13 MR. MCPHERSON: WE'VE ALREADY OFFERED IN THAT
14 REGARD. WE'VE PRESENTED OUR DECISIONS TO MR. MAC DOUGALL ON
15 BEHALF OF THE CIA --

16 THE COURT: WHAT'S --

17 MR. MCPHERSON: -- THROUGH MY 1 AUGUST 2007 LETTER
18 TO MR. MAC DOUGALL.

19 THE COURT: WHAT'S HIS NEXT MOVE, THEN, ASSUMING WE
20 GO AS YOU THINK IT OUGHT TO OCCUR?

21 MR. MCPHERSON: ONE OPTION TO HIM IS TO INSTITUTE A
22 CIVIL ACTION IN AN APPROPRIATE COURT.

23 THE COURT: WHERE WOULD THAT BE, D.C.?

24 MR. MCPHERSON: I'D HAVE TO REFER TO THE GENERAL
25 VENUE PROVISION OF THE FEDERAL STATUTES. MOSTLY LIKELY IN

1 VIRGINIA, BUT I WOULD ASK MR. MAC DOUGALL TO DO HIS OWN
2 RESEARCH.

3 THE COURT: DOES THAT THEN GO TO A DISTRICT COURT
4 THERE OR IS THERE A SPECIAL --

5 MR. MCPHERSON: A DISTRICT COURT, YOUR HONOR. IT
6 WOULD BE REVIEWING THE RECORD BELOW AND TO FIND IF THE
7 AGENCY'S ACTION WAS ARBITRARY AND CAPRICIOUS, WHICH COURTS ARE
8 VERY FAMILIAR WITH DOING IN ANY ADMINISTRATIVE PRACTICE.

9 THE MORE EXPEDIENT ROUTE, WHICH WE HAVE SUGGESTED
10 AND WHICH THE U.S. ATTORNEY'S OFFICE HAS URGED, IS TO RIPEN
11 ALL THESE ISSUES AND MAKE A DISCOVERY DEMAND UPON THE
12 GOVERNMENT. AND THEN HOWEVER THAT DISCOVERY DEMAND IS
13 DECIDED, PERHAPS MR. HALPERN AGREES WITH MR. MAC DOUGALL AND
14 INFORMS ME OF THAT AND THAT CHANGES OUR DECISION OR
15 MR. HALPERN MAKES A DECISION WHICH MR. MAC DOUGALL DOES NOT
16 AGREE WITH. THAT CAN BE BROUGHT TO THE COURT'S ATTENTION
17 PROPERLY THROUGH A MOTION TO COMPEL AND NOW DECIDES ON THE
18 FEDERAL RULES OF CRIMINAL PROCEDURE.

19 THE REASON THE COURT IS GRAFTED WITH WHAT STANDARD
20 TO APPLY IS BECAUSE THIS IS NEITHER FISH NOR FOWL. YOU CAN'T
21 SUBMIT A TOUHY REQUEST AND ASK IT TO BE REVIEWED JUDICIALLY
22 UNDER THE FEDERAL RULES OF CRIMINAL PROCEDURE. THIS COURT --
23 I THINK IT WOULD BE REVERSIBLE ERROR TO FIND THAT THE
24 GOVERNMENT HAS VIOLATED THE DEFENDANT'S 5TH AMENDMENT DUE
25 PROCESS RIGHTS OR 6TH AMENDMENT RIGHTS TO EFFECTIVE ASSISTANCE

1 OF COUNSEL WITHOUT THE GOVERNMENT PARTICIPATING IN THE
2 PROCEEDINGS.

3 AND SO THAT'S WHY YOU'VE GOT TWO LANES AVAILABLE TO
4 YOU: APA ABUSE OF DISCRETION OR A DISCOVERY DEMAND IN WHICH
5 THIS COURT WILL PARTICIPATE DIRECTLY, WHICH WE SUGGEST IS THE
6 MOST EXPEDIENT AND EFFICIENT. FOR WHATEVER REASON, THAT PATH
7 HAS BEEN OPEN TO MR. MAC DOUGALL SINCE THE DAY OF THE
8 INDICTMENT. FOR WHATEVER REASON, TACTICAL OR OTHERWISE,
9 THEY'VE CHOSEN NOT TO ELECT THAT ROUTE. THAT'S FINE. BUT
10 THERE ARE CONSEQUENCES. THERE'S A DIFFERENT LEGAL REGIME
11 WHICH APPLIES TO EACH ONE.

12 THE COURT: YOU UNDERSTAND THE DILEMMA THAT I'M IN,
13 THOUGH. I'VE ARTICULATED IN THE CONTEXT OF THE ONE EXAMPLE.
14 LET'S SAY THAT THEY HAVE COME UP WITH EVIDENCE THAT SOME
15 WITNESS WHO PREVIOUSLY SPOKE TO THE GOVERNMENT ON WHICH THE
16 GOVERNMENT -- ON WHOM THE GOVERNMENT RELIED IN GAINING THE
17 INDICTMENT WHO THE GOVERNMENT INTENDS TO CALL HAS IN THE PAST
18 MADE AN INCONSISTENT STATEMENT OR DONE SOMETHING THAT WILL --
19 CAN BE EXPOSED AT TRIAL AND RUIN THE PERSON'S CREDIBILITY AND
20 MAY CALL INTO QUESTION THE WHOLE ISSUE OF THE VIABILITY OF THE
21 GOVERNMENT'S CASE.

22 WHAT YOU'RE SUGGESTING IS THEY HAVE TO SHOW THEIR
23 WHOLE CARDS AND REVEAL THAT TO THE GOVERNMENT IN ADVANCE IN
24 ORDER TO GET TO THAT WITNESS.

25 MR. MCPHERSON: THEY DO NOT. THERE WOULD BE NO

1 NECESSITY FOR MR. MAC DOUGALL TO IDENTIFY THE WITNESS. THEY
2 CAN PROPOUND A DISCOVERY DEMAND UPON THE GOVERNMENT
3 REPRESENTED BY THE U.S. ATTORNEY AND SAY, "GIVE ME EVERYTHING
4 YOU HAVE ON PROGRAM 1, PROGRAM 2, AND PROGRAM 3." THE U.S.
5 ATTORNEY'S OFFICE, WHO HAS MUCH BETTER COMMAND OF THE CHARGES,
6 THE EVIDENCE, THE WITNESSES, THE AVAILABLE DEFENSES WILL MAKE
7 SOME DECISION.

8 THE COURT: I WANT TO TALK IN A HIGH LEVEL OF
9 GENERALITIES. THERE'S ONE PROGRAM HERE THAT YOU'VE LOOKED AT
10 AND SAID, "WE DON'T SEE THE RELEVANCE. IT'S HIGHLY SENSITIVE.
11 WE'RE NOT GOING TO TURN IT OVER."

12 IT'S YOUR POSITION THAT ALL MR. MAC DOUGALL HAS TO
13 SAY IS, IN A VERY GENERAL WAY, "WE WANT TO TALK TO THE PEOPLE,
14 AND IT IMPLICATES THIS PROGRAM" OR DOES HE HAVE TO BE AS
15 SPECIFIC AS HE WAS IN THE PAPERS THAT HAVE BEEN FILED WITH ME
16 AND SAY "HERE'S WHAT WE WANT TO ASK. HERE'S THE SUBPARTS OF
17 THE QUESTIONS WE'RE GOING TO GET INTO"?

18 MR. MCPHERSON: OUR POSITION, AFTER HEARING HIS
19 PROFFER, IS THAT NONE OF THAT PROGRAM IS RELEVANT TO THE
20 CHARGES IN THE INDICTMENT OR ANY AVAILABLE DEFENSE.

21 THE COURT: I DON'T KNOW WHERE THAT GETS US. IF HE
22 MAKES A GENERIC REQUEST TO MR. HALPERN, THEY CONVEY THAT TO
23 YOU, AND YOU SAY "WAIT A MINUTE. THIS IMPLICATES ALL KINDS OF
24 SPECIFICS, AND I DON'T KNOW EXACTLY WHAT HE'S GOING TO ASK.
25 I'M CONCERNED ABOUT THIS," AND THEN YOU SAY "TELL HIM 'NO,'"

1 AND THEN HALPERN COMES BACK AND TELLS MR. MAC DOUGALL "NO,"
2 WHERE DO WE GO FROM THERE?

3 MR. MCPHERSON: YOU'D BE IN THE SAME POSITION. THIS
4 HAS NOTHING TO DO WITH CLASSIFIED INFORMATION. THAT'S THE
5 POSITION THAT THE COURT IS FACED WITH ANYTIME THE DEFENDANT
6 MAKES A DISCOVERY DEMAND WITH WHICH THE GOVERNMENT DISAGREES.

7 AND THE DEFENDANT IS REVEALING SOMETHING ABOUT HIS
8 THOUGHT PROCESSES WHEN HE SUBMITS HIS DISCOVERY DEMAND TO THE
9 GOVERNMENT. IT'S UP TO HIM TO FIND THE CONTOURS OF THAT
10 DISCOVERY DEMAND.

11 THE COURT: WHEN YOU WERE SPEAKING, MR. MCPHERSON,
12 ANOTHER THOUGHT OCCURRED TO ME, WHICH MAY BE A WAY TO SOLVE
13 THIS.

14 I ALLUDED EARLIER TO CREATING A WALL WITHIN A
15 PROSECUTOR'S OFFICE. THAT HAPPENS OCCASIONALLY.

16 MR. HALPERN, WHY CAN'T ONE OF THE PROSECUTORS
17 ASSIGNED TO THIS CASE BE THE DISCOVERY MONITOR TO WHOM
18 MR. MAC DOUGALL COMMUNICATES THESE REQUESTS, BUT THAT PERSON
19 WILL BE FORBIDDEN FROM TALKING TO THE OTHERS AND CANNOT ANY
20 LONGER TAKE AN ACTIVE PART IN THE TRIAL OF THE CASE?

21 MR. HALPERN: THE PROBLEM IS --

22 THE COURT: YOU DON'T NEED ALL THESE PROSECUTORS TO
23 TRY THIS CASE.

24 YOU'VE GOT FOUR?

25 MR. HALPERN: THE PROBLEM, YOUR HONOR, IS YOU'RE

1 TRYING TO REACH A PRAGMATIC SOLUTION. AND I DON'T QUARREL
2 WITH WHAT YOU'RE DOING. IN FACT, IF I WERE SITTING IN YOUR
3 CHAIR, I'D BE DOING THE EXACT SAME THING. THIS JUST ISN'T THE
4 WAY THAT WE'RE SUPPOSED TO BE DOING THIS UNDER THE LAW.

5 I AGREE WITH THE READING BY MR. MCPHERSON OF EXXON
6 VALDEZ. I THINK ONE OF THE OTHER POINTS THAT I WOULD HAVE
7 BROUGHT UP IS THAT'S A DIFFERENT CASE BECAUSE AT THE POINT
8 THAT WE'RE CLOSER TO EXXON VALDEZ, DISCOVERY IS PROPOUNDED,
9 AND THEN WE'RE AT THE TABLE. AND THAT'S REALLY THE PROBLEM.
10 THE COURT SAID, "WELL, HOW ABOUT IF I MADE A BAD RULING?"
11 IT'S NOT THAT WE'RE WORRIED ABOUT YOUR RULING. BUT YOU SAY,
12 "IF I MAKE A BAD RULING, YOU CAN APPEAL." HOW CAN I APPEAL?
13 I'M NOT EVEN PART OF THE PROCEEDINGS. I DON'T KNOW WHAT THE
14 RECORD IS. WE'RE CUT OUT ENTIRELY.

15 THE COURT: YOU'RE RIGHT. THAT'S A PROBLEM.

16 MR. HALPERN: TOUHY ITSELF, THIS IS WHAT WAS BUILT
17 INTO TOUHY THE WAY TO DO IT. IF THIS IS A CONSTITUTIONAL
18 ATTACK ON TOUHY, I THINK THAT LOSES. THE LAW HAS APPROVED
19 THIS AS APPROPRIATE WAY TO ADDRESS THESE ISSUES.

20 THE COURT: COME BACK TO THE COMPROMISE THAT I'VE
21 SUGGESTED, THOUGH. AND I DON'T MEAN THIS IN A DISPARAGING WAY
22 AT ALL.

23 WHY CAN'T WE HAVE SOMEBODY FROM THE U.S. ATTORNEY'S
24 OFFICE THAT'S JUST GOING TO DEAL WITH THIS ISSUE OF DISCOVERY
25 AND MAKE THE ARGUMENTS ON BEHALF OF THE UNITED STATES, BUT

1 WILL NOT CONVERSE WITH THE OTHER PROSECUTORS AND WILL NOT
2 ACTIVELY PARTICIPATE IN THE TRIAL SO THAT AT LEAST I CAN
3 ACCOMMODATE BOTH SETS OF INTERESTS THAT I'M CONCERNED ABOUT
4 HERE?

5 MR. HALPERN: WELL, NUMBER ONE, YOUR HONOR, THERE'S
6 NO RIGHT TO HAVE THE GOVERNMENT DO THAT. I'M NOT SAYING WE
7 CAN'T. THERE ARE PROBLEMS IN THAT. IN TERMS OF BIFURCATING
8 OUR PROSECUTIONS TEAM, WE'RE SIMPLY ONE LEVEL REMOVED FROM
9 WHERE WE ARE NOW. I'M NOT SURE THAT PERSON WOULD REALLY
10 UNDERSTAND THE APPROPRIATE WAY TO DO IT.

11 BUT WHAT REALLY BOTHERS ME ABOUT IT IS NOT SO MUCH
12 THE PRACTICAL SUGGESTION. IT'S THAT THAT'S NOT WHAT THE LAW
13 SUGGESTS. IT'S NOT THE WAY WE SHOULD DO IT. I'M BOTHERED
14 WHEN WE'VE GOT PROBLEMS WITH A TOUHY REQUEST AND IT'S DENIED
15 AND THEN COUNSEL INDICATES "WELL, THIS IS JUST ONE AREA. IT'S
16 WITHIN THE INDICTMENT." IT'S NOT.

17 THEY'RE ASKING FOR WHOLESALE ACCESS, WHICH I THINK
18 IS WHAT BOTHERS MR. MCPHERSON, INTO A COMPARTMENT WITH NO
19 JUSTIFICATION TIED TO THE INDICTMENT. TO THE EXTENT THAT'S
20 APPROPRIATE OR NOT, IT'S SOMETHING WE BOTH HAVE TO -- SHOULD
21 DEFER TO. AS TO WHETHER IT'S RELEVANT OR NOT, THAT'S
22 SOMETHING THAT FALLS WITHIN OUR SPHERE. AND IF IT DOES FALL
23 WITHIN OUR SPHERE, THAT'S NORMAL DISCOVERY. WE DON'T MAKE
24 THIS DISTINCTION. WE DON'T TRY TO FORM AN ARTIFICIAL WALL IN
25 OTHER CASES.

1 THE COURT: WHAT IF THEY MAKE THAT REQUEST? LET'S
2 ASSUME THAT I GO WITH YOUR ARGUMENT, AND REQUESTS IN THE FIRST
3 INSTANCE HAVE TO BE PRESENTED TO YOU AS THE CASE PROSECUTOR.
4 IF I'M MR. MAC DOUGALL, I'M GOING TO MAKE IT VERY GENERAL.
5 I'M GOING TO SAY, "HERE'S WHAT I NEED. TRUST ME. THIS IS
6 RELEVANT TO THE DEFENSE." THEN YOU SAY, "NO, WE'RE NOT GIVING
7 IT." THEN THE ISSUE IS JOINED. IT'S IN FRONT OF ME NOW.

8 IN MANY OTHER INSTANCES WHERE THAT'S AT ISSUE, I
9 WILL CONFER EX PARTE WITH DEFENSE COUNSEL TO SAY, "TELL ME
10 WHAT YOUR THEORY IS. TELL ME WHY YOU THINK IT'S RELEVANT."
11 WE'LL MAKE A RECORD ON THAT THAT WILL BE COMPLETELY
12 REVIEWABLE, BUT THEN I'LL COME OUT AND ISSUE AN APPROPRIATE
13 ORDER. IF I AGREE, I'LL SAY, "YES, YOU MUST TURN IT OVER."

14 HOW DOES THAT HELP THE SITUATION?

15 MR. HALPERN: WE HAVE TO PUT OVERLAY AT CIPA BECAUSE
16 THEY ARE ASKING FOR DISCLOSURE OF CLASSIFIED INFORMATION. I
17 DON'T MEAN TO PULL CIPA OUT AS A TRUMP CARD TO GIVE THE
18 ANALOGY DOWN THE ROAD. BUT THERE IS A FRAMEWORK. THE CASE IS
19 DECIDED UNDER CIPA. THAT'S HOW THEY ALL DO IT.

20 DOES IT CUT AWAY SOME OF THE NORMAL MANEUVERING
21 RULES THE DEFENSE HAS? IT DOES. I CAN TELL YOU THIS: IT
22 CUTS AWAY FAR MORE THAN OURS. IT'S NOT THAT THE GOVERNMENT
23 WANTS CIPA. "OH, THIS IS GOING TO HELP US." IT'S A VERY
24 CUMBERSOME PROCEDURE THAT, AS THE COURT IS ABOUT TO SEE AS
25 SOON AS WE GET INTO THE FIVE AND SIX HEARINGS, WE'RE GOING TO

1 HAVE TO MAKE ALL TYPES OF CONCESSIONS IN OUR CASE IN TERMS OF
2 WHAT WE PRESENT THAT WE DON'T WANT TO BUT THAT WE HAVE TO.

3 BECAUSE ANYTIME YOU DEAL WITH CLASSIFIED
4 INFORMATION, WE HAVE TO BOW TO WHAT THE AGENCY SAYS AS TO WHAT
5 WE CAN SAY AND WHAT WE CAN'T SAY. SO THERE ARE LIMITATIONS ON
6 BOTH WAYS. THAT'S THE HAND WE'VE BEEN DEALT. I CAN'T AGREE
7 TO GO DOWN ANY PATH THAT ISN'T, IN FACT, WITHIN THAT
8 FRAMEWORK.

9 THE COURT: I DON'T LIKE IT. I'M NOT COMFORTABLE
10 WITH IT. I TRIED A LOT OF CASES AS A LAWYER. I TRY A FAIR
11 NUMBER OF THEM NOW AS A JUDGE. AND I CAN SEE A VERY COMMON
12 CIRCUMSTANCE COMING UP WHERE THEY WOULD HAVE TO REVEAL
13 SOMETHING THAT MIGHT GIVE YOU AN EDGE. IT MIGHT CAUSE YOU,
14 NOTWITHSTANDING THAT -- PUT ASIDE THE IDEA OF CHANGING COURSE
15 TO PROTECT CLASSIFIED INFORMATION. I COULD SEE A CHANGE IN
16 COURSE BECAUSE YOU SAY, "WE DIDN'T KNOW ABOUT THIS. IF THIS
17 COMES UP, THIS IS GOING TO BE BAD. WE'RE GOING TO CHANGE
18 COURSE ON OUR TRIAL STRATEGY HERE TO AVOID THIS SITUATION."
19 THEY'RE TIPPING THEIR HAND IN ADVANCE. IT GIVES THE
20 GOVERNMENT AND ADVANTAGE.

21 MR. HALPERN: YOU MAY BE RIGHT, YOUR HONOR, BUT I'LL
22 SAY THIS. WE'LL LOOK AT BOTH SIDES.

23 WE'RE GOING TO BE GIVING EVIDENCE ON BOTH ENDS WHEN
24 WE GO INTO SECTION 5 BECAUSE BY OUR PROPOSED SUBSTITUTIONS,
25 THEY'RE GOING TO HAVE -- YOUR HONOR, I THINK, FRANKLY, IT'S A

1 FAR MORE ADVANTAGE, THE NOTION ITSELF THAT WE'RE ARGUING ON
2 THIS, THESE SEVEN INDIVIDUALS, THAT WE REALLY CARE ABOUT WHAT
3 THEY'RE GOING TO TALK ABOUT. THEY CAN'T PRESENT THESE PEOPLE
4 AT TRIAL IF IT'S CLASSIFIED INFORMATION WITHOUT FIRST ALERTING
5 US.

6 SO ALL WE'RE REALLY ARGUING OVER IN TERMS OF A
7 TACTICAL ADVANTAGE IS WE WON'T KNOW THIS SPECIFIC AREA OR
8 WE'LL LEARN IT A MONTH OR TWO EARLIER THAN WE MIGHT HAVE.
9 LIKE THIS IS SUCH AN ADVANTAGE THE GOVERNMENT HAS? IT'S
10 NOT -- WELL, IT IS AN ADVANTAGE, BUT IT'S NOT A BIG ONE. IT'S
11 NOTHING THAT I WOULD BE UP HERE ARGUING FOR. I COULD GIVE
12 THIS AWAY IN A HEARTBEAT.

13 I HAVE TO ARGUE AS A MATTER OF PRINCIPLE THAT THE
14 COURT, THE GOVERNMENT, THE DEFENSE ARE STUCK WITH THESE CIPA
15 PROCEDURES THAT HAVE BEEN APPROVED. AND MAYBE WE COULD ALL DO
16 BETTER IF WE CAME UP AND THOUGHT ABOUT IT. BUT THAT'S NOT A
17 LUXURY THAT I HAVE AS A PROSECUTOR; THAT I CAN JUST SAY,
18 "WELL, LET'S IGNORE IT BECAUSE WE CAN GET THERE. I'VE GOT MY
19 CLIENT RIGHT HERE, AND I'M GOING TO FOLLOW THE INSTRUCTIONS
20 THAT I HAVE TO SAFEGUARD THE INFORMATION AS I SEE IT."

21 AND MR. MCPHERSON SAYS IT'S OKAY. THAT CHANGES THE
22 BALLGAME, BUT OTHERWISE --

23 THE COURT: HE SAYS IN ONE AND A HALF RESPECTS IT'S
24 NOT OKAY. IT'S TEMPTING FOR ME TO COMPARE THE RELATIVE
25 ADVANTAGES, BUT THE VICE IN THAT IS THAT ONE SET OF ADVANTAGES

1 HAS CONSTITUTIONAL IMPLICATIONS. TO ME, AT LEAST. REQUIRING
2 THEM TO TIP THEIR HAND ON HOW THEY'RE GOING TO DEFEND THIS
3 GUY, WHICH THERE WOULD BE A MIGHTY TEMPTATION ON YOUR PART,
4 EVEN THOUGH I KNOW YOU'RE NOT LOOKING FOR THIS ADVANTAGE, TO
5 SAY, "THIS GUY SAYS, 'OH, WE DIDN'T KNOW ABOUT IT. WE'RE NOT
6 CALLING THIS GUY. GET US A SUBSTITUTE WITNESS TO THIS POINT."

7 THAT'S GOING TO BE A BIG PROBLEM FROM MY
8 PERSPECTIVE. BECAUSE ALL OF A SUDDEN, ALL OF THE DEFENSE WORK
9 GOES UP IN SMOKE. THE COUPS THAT THEY'RE GOING TO PULL BY
10 HITTING THE GUY WITH THE INCONSISTENT STATEMENTS, "GUESS WHAT?
11 "WE'RE NOT CALLING THAT GUY ANYMORE."

12 MR. HALPERN: I HAVE ONLY ONE PROBLEM WITH WHAT YOU
13 SAID. I'M FAMILIAR WITH THIS COURT'S UNDERSTANDING OF TRIAL
14 PRACTICE, WHICH -- I DON'T NORMALLY DO THIS -- I WILL CLEARLY
15 DEFER IT'S GREATER THAN MINE. I'M NOT IN ANY WAY SUGGESTING
16 THAT YOU'RE NOT SEEING SOMETHING THAT I CAN SEE.

17 MY ONLY QUARREL IS WITH YOUR WORD "CONSTITUTIONAL."
18 IT GIVES THE GOVERNMENT -- NOW, I'M NOT SAYING WE DON'T GIVE
19 UP SOME THINGS. I DON'T WANT YOU TO WAIT. BUT IT GIVES THE
20 GOVERNMENT AN ADVANTAGE IN THE AREA YOU ARTICULATED.
21 CONSTITUTIONAL? WELL, IT'S BEEN DETERMINED BY OTHER COURTS.
22 AND AGAIN, I'M NOT EVEN SAYING IT'S RIGHT OR WRONG. ALL I
23 KNOW IS THAT'S WHAT THE SUPREME COURT SAYS. I DISAGREE WITH
24 THE SUPREME COURT A LOT. AS A GOVERNMENT PROSECUTOR, THOUGH,
25 I ALWAYS COME INTO COURT AND I ARGUE EXACTLY WHAT THEY SAY.

1 THAT'S THE LAW.

2 THE COURT: I'VE ACKNOWLEDGED THAT. I DENIED
3 MR. WILKES'S MOTIONS TO DECLARE THE STATUTE AND THE PROCEDURES
4 UNCONSTITUTIONAL. SO I'VE ACKNOWLEDGED THE CONSTITUTIONALITY
5 OF IT. IT'S VERY TROUBLESOME TO ME. I DON'T KNOW HOW IT
6 CAN'T BE SAID THAT THAT DOESN'T VIOLATE SOME 5TH AMENDMENT
7 RIGHT OF MR. FOGGO, YOU KNOW, TO REMAIN SILENT. I INSTRUCT
8 JURIES FROM THIS LITTLE BOOK OVER HERE THAT THE DEFENDANT
9 DOESN'T HAVE TO DO ANYTHING; DOESN'T HAVE TO TESTIFY, DOESN'T
10 HAVE TO PRESENT ANY EVIDENCE.

11 BUT HERE, IN ESSENCE, WE'RE TELLING HIM "YES, YOU
12 DO. YOU HAVE TO TELL THE GOVERNMENT IN ADVANCE BEFORE YOU CAN
13 DEFEND YOURSELF."

14 MR. HALPERN: AS A TRIAL ATTORNEY, I THINK WHAT
15 YOU'VE JUST SAID, YOU HAVE NOW ALLOWED MR. FOGGO AND
16 MR. WILKES TO HAVE THEIR CAKE AND EAT IT, TOO. THE REASON I
17 SAY THAT, THE TACTICAL ADVANTAGE HERE, IN MY OPINION, IS A
18 MINIMAL ONE I'D GIVE UP IN A SECOND. THEY HAVE THIS ISSUE.
19 THE MAY COURT MAY BE RIGHT. THIS IS A RECORD. THIS IS GOING
20 TO BE REVIEWED.

21 IF YOU'RE RIGHT, WE'RE GOING TO -- LET'S SAY THIS:
22 THE 9TH CIRCUIT, I THINK, IS CERTAINLY SENSITIVE TO THESE
23 TYPES OF ISSUES. IT'S GOING TO BE REVIEWED UP THERE. AND I
24 DON'T KNOW WHAT THE ANSWER IS GOING TO BE. ALL I KNOW IS AS I
25 READ THE CASES SO FAR, IT'S BEEN DEEMED TO BE CONSTITUTIONAL

1 EVEN THOUGH BOTH SIDES HAVE TO ADAPT A TRIAL TECHNIQUE.

2 THE COURT: ARE YOU AGAINST DESIGNATING ON OF YOUR
3 NUMBER -- MAYBE NOT ONE OF THE FOUR ASSIGNED PROSECUTORS, BUT
4 SOMEBODY ELSE WHO CAN GET UP TO SPEED REAL EASY AS BEING THE
5 DISCOVERY CONTACT PERSON AND ERECT THE WALL OF SEPARATION
6 BETWEEN THAT PERSON FOR DISCOVERY ISSUES?

7 THAT PERSON CAN COME IN AND SAY, "LOOK, WE DON'T
8 THINK THIS IS RELEVANT." I HEAR BOTH SIDES. THAT PERSON
9 COULD THEN MAKE THE DETERMINATION OF WHETHER AN APPEAL OF MY
10 ORDER DISCLOSING SOMETHING OR REQUIRING THAT SOMETHING BE
11 DISCLOSED --

12 MR. HALPERN: YOUR HONOR, YOU'RE ASKING FOR ME TO
13 DESIGNATE MYSELF BECAUSE I CAN TELL YOU I'M PROBABLY THE ONLY
14 PERSON WHO REALLY HAS A FULL GRASP OF THE CASE. MS. CHU
15 CLEARLY DOESN'T, AND SHE'S TRYING TO GET UP TO SPEED.

16 MR. FORGE EVEN, WHO CLEARLY UNDERSTANDS THE LEGAL
17 ISSUES, DOESN'T UNDERSTAND THE FACTS, HASN'T SEEN ALL THE
18 DOCUMENTS. THE ONLY PERSON WHO HAS PROBABLY IS MYSELF.
19 MR. BHANDARI WOULD BE NEXT. ALTHOUGH I THINK AS A PRACTICAL
20 MATTER, THAT WOULD BE DIFFICULT. GETTING UP TO SPEED IN THIS
21 CASE, IT'S NOT -- IT WOULD TAKE A WHILE TO DO IT. I'M NOT
22 WILLING TO SIT OUT, NOT AT LEAST WITHOUT BEING ORDERED.

23 THE COURT: ANYTHING ELSE, MR. MCPHERSON?

24 I HAVE YOUR POINT. I'VE BEEN TURNED AROUND, I
25 GUESS, IN MY THINKING BY WHAT YOU SAY. IT DOES PRESENT --

1 I'VE SUGGESTED THAT IF YOU DISAGREE WITH ME, YOU HAVE A RIGHT
2 TO APPEAL. BUT HOW? YOU'RE NOT GOING TO FILE AN APPEAL ON
3 BEHALF OF THE UNITED STATES TO THE 9TH CIRCUIT. IT HAS TO BE
4 NECESSARILY THE PROSECUTORS. AND TO FILE THE APPEAL, THEY
5 HAVE TO KNOW WHAT'S BEING APPEALED.

6 I DON'T LIKE THIS APA PROCEDURE. I GUESS OPTION 2,
7 DOOR NO. 2, IS THE ONE THAT WE HAVE TO GO WITH, WHICH IS
8 THAT MR. MAC DOUGALL -- AND I'LL HEAR FROM YOU AGAIN,
9 MR. MAC DOUGALL -- WOULD HAVE TO MAKE THE REQUEST IN THE FIRST
10 INSTANCE TO THE UNITED STATES.

11 I DON'T LIKE IT. I JUST DON'T LIKE THIS PROCEDURE.
12 IT REALLY CUTS AGAINST THE GRAIN OF MY INCULCATION AS THE GUY
13 THAT'S BEEN DOING CRIMINAL STUFF FOR 30 YEARS. AND I LABORED
14 UNDER THE DISADVANTAGE THAT PROSECUTORS LABOR UNDER IN
15 CRIMINAL CASES. YOU DON'T KNOW WHAT THE DEFENSE IS. YOU HAVE
16 NO RIGHT TO KNOW IN ALMOST EVERY INSTANCE.

17 I DON'T KNOW ABOUT 30 EXCEPTIONS TO THAT. I KNOW
18 ABOUT A COUPLE MENTAL DEFENSES AND NOTICE OF ALIBI IN SOME
19 CASES. EVEN IN DURESS CASES. I DON'T -- THEY HAVE TO MEET A
20 STANDARD, BUT THEY DON'T HAVE TO DISCLOSE THAT IN ADVANCE.

21 MR. HALPERN: THOSE ARE FOR DEFENSES. I THINK IT
22 CAME DOWN TO A DOZEN. BUT I THINK THERE ARE AT LEAST A DOZEN
23 I COULD COME UP WITH WHERE YOU HAVE TO GIVE NOTICE, LIKE
24 EXPERT TESTIMONY. THERE'S A WHOLE RANGE.

25 THE COURT: IT STILL REMAINS THE EXCEPTION, THOUGH.

1 IT DOES. IN MOST INSTANCES, THE CONVENTION IS THE DEFENSE
2 DOESN'T HAVE TO DISCLOSE ANYTHING. AS I SAID, YOU'RE IN THAT
3 UNCOMFORTABLE POSITION AS A PROSECUTOR HEARING A NAME CALLED
4 FOR THE FIRST TIME WHEN THE DEFENSE BEGINS ITS CASE. YOU SAY,
5 "WHO'S THAT?" YOU'RE DISPATCHING YOUR CASE AGENT TO RUN OUT
6 AND FIND A CRIMINAL RECORD ON A PERSON OR SEE WHAT THEY CAN
7 FIND OUT WHILE YOU BUSILY SCRIBBLE NOTES AND TRY TO WING IT
8 WITH THE PERSON.

9 THAT'S THE DISCONCERTING ASPECT. THAT'S THE WAY IT
10 WORKS IN MOST CASES. I'M BEING TOLD IN THIS CASE THEY HAVE NO
11 SUCH ADVANTAGE.

12 MR. MCPHERSON: I THINK THE COURT RECOGNIZES YOU ARE
13 NOT THE MASTER OF THE FACTS IN THE CASE, NOR SHOULD YOU BE AT
14 THIS POINT BECAUSE YOU HAVEN'T HAD THE BENEFIT OF ADVERSARIAL
15 BRIEFING ON THAT POINT. WHAT THE DEFENSE IS ASKING IS FOR YOU
16 TO MAKE THOSE SORT OF DISCOVERY DECISIONS, AND THAT'S NOT
17 FAIR. THEY'RE ASKING YOU TO MAKE A DISCOVERY DECISION WITHOUT
18 A DISCOVERY DEMAND IN WHICH THE GOVERNMENT PRESENTS ITS OWN
19 ADVERSARIAL POSITION.

20 THE COURT: I'M NOT SO TROUBLED ABOUT MAKING THE
21 RELEVANCY DETERMINATIONS. THAT PART DOESN'T SCARE ME. I
22 THINK THE BIGGER CONCERN IS -- AND YOU HIT ON IT -- WHAT
23 STANDARD SHOULD I APPLY HERE? HOW MUCH DEFERENCE SHOULD I
24 GIVE? I THINK IT'S ENTIRELY APPROPRIATE THAT THE STANDARD FOR
25 REVIEWING DECISIONS NOT TO RELEASE INFORMATION IN THIS CONTEXT

1 IS ARBITRARY AND CAPRICIOUS. I AGREE WITH THAT. SOME OF THIS
2 STUFF IS HIGHLY CLASSIFIED STUFF.

3 WHEN THE DAY BEGINS, I'M AN AMERICAN LIKE EVERYONE
4 ELSE; LIKE MR. MAC DOUGALL AND MR. HALPERN AND YOU. I DON'T
5 WANT TO DO ANYTHING THAT WOULD JEOPARDIZE OUR NATIONAL
6 SECURITY. AND I REITERATE, I KNOW WHAT I DON'T KNOW. WHAT I
7 DON'T KNOW ARE ALL OF THE REASONS THAT INFORM YOUR DECISIONS,
8 WHY THIS STUFF HAS TO REMAIN SECRET. I HAVE AN IDEA OF IT,
9 BUT I'M SURE YOU COULD TELL ME IN GREAT DETAIL.

10 SO WHAT I ENVISIONED WAS A SITUATION WHERE
11 MR. MAC DOUGALL MADE A CASE ON RELEVANCY, AND THEN HE SAID,
12 "THAT'S ALL WELL AND GOOD, BUT LET ME TELL YOU WHAT THE OTHER
13 SIDE OF THE COIN IS HERE. HERE'S WHY WE CAN'T GIVE THIS
14 INFORMATION EVEN THOUGH IT MAY HAVE SOME RELEVANCE HERE." I
15 GUESS IT'S NOT SUPPOSED TO WORK THAT WAY.

16 MR. MCPHERSON: WE WOULD DISPUTE THE RELEVANCE.

17 THE COURT: YES.

18 AND SO WHAT TROUBLES ME ABOUT THIS AT THE END OF THE
19 DAY, MR. HALPERN'S GOT TO GET THE EXPLANATION FROM YOU ABOUT
20 WHY THIS IS SO CRITICAL AND SENSITIVE THAT NOTWITHSTANDING
21 SOME MARGINAL RELEVANCE, IT STILL SHOULD BE TURNED OVER.

22 I MAY HAVE INFLATED A FEW THINGS. IF IT'S RELEVANT,
23 THEN WE MAY HAVE TO GO TO A SITUATION WHERE IT HAS TO BE
24 TURNED OVER OR THEY HAVE TO CHANGE COURSE. BUT THAT, AGAIN,
25 IMPLICATES THE UNITED STATES ATTORNEY AND THEIR ADVOCACY

1 RATHER THAN YOURS. YOU'RE NOT TRYING THE CASE.

2 MR. MCPHERSON: THAT'S WHY WE JOINED THE U.S.
3 ATTORNEY'S OFFICE IN URGING THE COURT TO SET AS SHORT AS
4 POSSIBLE A BRIEFING SCHEDULE AND CIPA SCHEDULE. BECAUSE IN MY
5 OWN EXPERIENCE IN MANY OF THESE CASES, THAT RESOLVES ALL THESE
6 QUESTIONS, AND THE TOUHY JUST GOES IN LOCK-STEP WITH THE
7 DISCOVERY DECISIONS.

8 THE COURT: I DON'T UNDERSTAND YOUR LAST STATEMENT
9 BECAUSE HOW DO THEY MAKE THE REQUEST WHEN -- HOW DO THEY COME
10 TO ME AND SAY "HERE'S WHAT WE WANT" WHEN THEY HAVEN'T HAD THE
11 CHANCE TO CONDUCT THESE INTERVIEWS WHICH MAY LEAD TO FURTHER
12 INFORMATION, FOR EXAMPLE.

13 MR. MCPHERSON: THEY KNOW ENOUGH OF THE PROGRAMS
14 THEY WANT TO TALK ABOUT. SO THEY KNOW ENOUGH TO SUBMIT THAT
15 DISCOVERY REQUEST TO THE GOVERNMENT.

16 THE COURT: DON'T YOU WANT TO KNOW MORE, THOUGH?
17 THE BRIEFING HERE IS VERY SPECIFIC ABOUT WHAT PARTS OF THE
18 PROGRAMS THEY'RE INTERESTED IN.

19 NOW, IF I CAN PROGNOSTICATE A LITTLE BIT, I DON'T
20 THINK MR. MAC DOUGALL, IF HE'S FORCED TO GO THROUGH A RULE 16
21 TYPE PROCEDURE, IS GOING TO BE THAT SPECIFIC. HE'S JUST GOING
22 TO BE FAIRLY GENERIC. HE'LL COME TO YOU, AND YOU'LL HAVE SOME
23 CONTEXT AND BACKGROUND BECAUSE HE'S ALREADY SPOKEN TO YOU.

24 MR. MCPHERSON: THE SHORT ANSWER IS YOU GET WHAT YOU
25 ASK FOR. WHATEVER DISCOVERY DEMAND HE PROPOUNDS UPON THE

1 GOVERNMENT, THAT'S WHAT HE'LL GET IF IT'S DETERMINED TO BE
2 MATERIAL TO THE DEFENSE.

3 THE COURT: THANK YOU, MR. MCPHERSON.

4 MR. MAC DOUGALL, I'VE BEEN TURNED AROUND IN MY
5 THINKING A LITTLE BIT ON THIS. I HATE TO SEEM SO WISHY-WASHY,
6 BUT I'M BUFFETED HERE. THERE IS A PROCEDURE -- AND I DON'T
7 WANT TO IGNORE THAT PROCEDURE ENTIRELY. IT DOESN'T MAKE ANY
8 SENSE TO ME. I DON'T THINK YOU'LL EMBRACE THAT PROCEDURE IF I
9 GIVE YOU THE TWO CHOICES, MR. MCPHERSON.

10 I LIKE THE IDEA OF MAYBE THE GOVERNMENT DESIGNATING
11 SOMEONE AND THE TWAIN WOULDN'T MEET BETWEEN GOVERNMENT
12 PROSECUTORS. AT LEAST THEN WE'VE CURED ALL THESE PROBLEMS
13 WITH REPRESENTATIONS BY THE UNITED STATES.

14 BUT THE DILEMMA THAT WE HAVE IS THAT IF I MEET WITH
15 YOU, MR. MCPHERSON, AND HE PERSISTS IN REFUSING AND THEN I SAY
16 "WELL, YOU'VE GOT TO DO THIS," WHO TAKES THE APPEAL FOR THE
17 UNITED STATES FROM THAT DECISION? HE'S FORBIDDEN FROM TELLING
18 THEM "LOOK, THE OFFER OF PROOF IS." HE'S NOT IN A POSITION TO
19 REPRESENT THE UNITED STATES IN THE COURT OF APPEALS HERE.

20 MR. MAC DOUGALL: THE ANSWER TO THAT, YOUR HONOR, IS
21 THE JUSTICE DEPARTMENT HAS MANY THOUSANDS OF VERY FINE
22 LAWYERS. I USED TO BE ONE OF THEM. THE APPELLATE DIVISION
23 HAS SEVERAL HUNDRED OF THEM, WHO ARE ALL VERY ACCOMPLISHED
24 PRACTITIONERS. THERE'S LOTS OF OPPORTUNITY FOR THE GOVERNMENT
25 TO TAKE THIS UP, YOUR HONOR.

1 IT'S A VERY IMPORTANT ISSUE FOR MR. FOGGO AND FOR
2 ANYONE WHO FINDS THEMSELVES IN THAT SITUATION BECAUSE IT GOES
3 TO THE HEART OF HIS ABILITY TO DEFEND HIMSELF. AND THE COURT
4 POINTED OUT AND USES AN EXAMPLE, A VERY OBVIOUS ONE; THE
5 WITNESS ABOUT WHOM THERE'S IMPEACHMENT EVIDENCE AVAILABLE.
6 THERE ARE MANY OTHER OPPORTUNITIES.

7 AND ONE THAT I WOULD POSIT TO THE COURT WITHOUT
8 GOING INTO TOO MUCH DETAIL IS WHAT IF THEY GOT IT ALL WRONG?
9 WHAT IF THEY MADE A HUGE MISTAKE? WHAT IF THEY HAVEN'T BEEN
10 READ INTO THESE COMPARTMENTS? WHAT IF WHEN THEY ARE READ YOU
11 BEGIN TO UNDERSTAND THAT THE CASE IS UPSIDE-DOWN, THAT IT'S
12 WRONG, THAT THERE ARE THINGS THAT WERE IGNORED. AND WE HAD
13 CONVERSATIONS BEFORE THE INDICTMENT "THERE ARE WITNESSES YOU
14 HAVEN'T TALKED TO. YOU NEED TO TALK TO THEM." IT NEVER
15 HAPPENED.

16 THAT'S THE HEART OF THE DEFENSE OF A CRIMINAL CASE,
17 YOUR HONOR. TO TAKE THAT AWAY FROM US AND TO DO IT WITHOUT
18 HAVING HEARD OUR EX PARTE PRESENTATION, WHICH I WOULD IMPORE
19 THE COURT TO DO BEFORE MAKING ANY DECISION, IS I THINK TO TAKE
20 AWAY FROM MR. FOGGO A VERY FUNDAMENTAL RIGHT AND PUT THE
21 ABILITY TO TRY THIS CASE EFFECTIVELY WITHOUT IT COMING BACK
22 AGAIN AT GREAT RISK.

23 THE COURT: WHAT DO YOU MAKE OF THE FACT THAT THE
24 VARIOUS COURTS THAT HAVE LOOKED AT THE CONSTITUTIONALITY OF
25 THIS PROCEDURE AND IN THE PARTICULAR CONTEXT OF THE ARGUMENTS

1 RAISED HERE, THE 5TH AND 6TH AMENDMENT RIGHTS, AND SAID, "NO,
2 IT'S CONSTITUTIONAL"? WHAT DO I DO WITH THOSE?

3 I HAVEN'T FOUND A COURT THROWING IT OUT BECAUSE YOU
4 HAVE TO SHOW YOUR HAND A LITTLE BIT MORE TO GET THE
5 INFORMATION YOU NEED TO DEFEND IT. THAT SPECIFIC ISSUE HAS
6 BEEN RAISED. IT'S BEEN REJECTED BY THE COURTS THAT HAVE
7 LOOKED AT IT.

8 MR. MAC DOUGALL: AGAIN, YOUR HONOR, ALL WE'RE
9 ASKING FOR IS THE LICENSE TO ASK QUESTIONS. THE INFORMATION
10 GOES NO FURTHER THAN LAWYERS WHO HAVE BEEN CLEARED AT THE
11 HIGHEST LEVEL.

12 NOW, THAT MAY WELL LEAD US TO MAKE A CIPA MOTION AND
13 FOLLOW THAT PROCEDURE. BUT THE INFORMATION GOES NO FURTHER.
14 I GO BACK TO THE QUESTION I ASKED EARLIER. WHAT ARE THEY
15 AFRAID OF? WHAT ARE THEY AFRAID THAT WE'RE GOING TO HEAR FROM
16 A WITNESS CLEARED AT THE SAME LEVEL WE ARE THAT'S GOING TO
17 CAUSE MISCHIEF? THERE'S BEEN LEAKS IN THIS CASE. IT HASN'T
18 BEEN FROM THE DEFENSE.

19 MR. HALPERN MAKES MUCH NORTH OF THE WHOLE EX PARTE
20 PROCESS. BUT AS THE COURT IS WELL AWARE, THE GOVERNMENT WAS
21 VERY HAPPY TO USE THE EX PARTE PROCESS TO CHANGE THE COURT'S
22 MIND AND REMOVE MR. WILKES'S LAWYER; AS THE COURT REFLECTED IN
23 MAKING THAT RULING, AN EXTRAORDINARY AND VERY DIFFICULT
24 DECISION.

25 SO THE IDEA THAT THE GOVERNMENT IS PERMITTED TO COME

1 IN AND MAKE EX PARTE PRESENTATIONS AND TURN AROUND AND
2 ESSENTIALLY DEPRIVE, PERHAPS CORRECTLY, A LITIGANT AND HIS
3 LAWYER IN A CRIMINAL CASE AND THE DEFENSE IS NOT ALLOWED TO
4 COME IN AND SAY, "YOUR HONOR, THIS IS POWERFUL STUFF. THIS IS
5 VERY POWERFUL" -- AND THE COURT MAY DISAGREE -- BUT WE'VE DONE
6 OUR HOMEWORK. WE'VE GOT SOME DOCUMENTS. WE'VE GOT SOME
7 FACTS. AND WE THINK THAT IT GOES TO THE HEART OF THE
8 INDICTMENT. IT GOES TO THE HEART OF THE EVIDENCE.

9 THE COURT: YOU DON'T DISAGREE OR DISPUTE THAT
10 ULTIMATELY YOU'RE GOING TO HAVE TO MAKE THAT SAME PRESENTATION
11 TO ME, TO THE EXTENT IT IMPLICATES CLASSIFIED INFORMATION, IN
12 THE PRESENCE OF THE UNITES STATES ATTORNEYS; RIGHT?

13 MR. MAC DOUGALL: WE ARE, YOUR HONOR. AND I RESPECT
14 THAT. AND WE EXPECT THAT ONCE WE HAVE REACHED THAT POINT,
15 WE'D BE PREPARED TO DO IT.

16 BUT HERE'S MY CONCERN, AND IT'S A VERY SERIOUS ONE:
17 THE GOVERNMENT, AS EVERYONE KNOWS, HAS ENORMOUS TOOLS
18 AVAILABLE TO IT. WHEN I WAS IN THE JUSTICE DEPARTMENT, I SAW
19 A DEFENSE WITNESS INDICTED TO KEEP HIM OFF THE STAND. THAT
20 HAPPENS. AND I'M NOT SUGGESTING ANYONE WOULD DO THIS. WE'VE
21 GOT A SUPERSEDING INDICTMENT. WE'VE GOT THE GRAND JURY
22 CONTINUED PAST THE INDICTMENT.

23 THE ABILITY TO SEND FEDERAL AGENTS TO GO MEET WITH
24 SOMEONE AND SAY "WE'D LIKE TO TALK TO YOU AGAIN ABOUT WHAT
25 YOU'RE DOING," WE ALL KNOW HOW THAT WORKS. AND THAT DAY MAY

1 COME. BUT WE'D LIKE TO HAVE BEFORE THE COURT AND ON THE
2 RECORD WHAT WE'RE TRYING TO ACCOMPLISH AND HOW IMPORTANT IT IS
3 TO THE DEFENSE BECAUSE THEY MIGHT HAVE MISSED IT.

4 THE COURT: WELL, I'M NOT AGAINST DOING THAT.
5 I JUST DON'T KNOW WHERE IT'S GOING TO GET US, THOUGH,
6 MR. MAC DOUGALL. I CAN BE IN FULL AGREEMENT WITH YOU, BUT
7 THEN I COME BACK TO THESE ESTABLISHED PROCEDURES. AND I THINK
8 THEY'RE PROBABLY RIGHT. I DON'T LIKE THE APA APPROACH. I
9 DON'T LIKE THAT.

10 WHAT'S YOUR EXPERIENCE WITH THAT? HOW LONG DOES
11 THAT TAKE? HAVE YOU FILED A CIVIL ACTION IN AN ADMINISTRATIVE
12 PROCEDURES ACT?

13 MR. MAC DOUGALL: I HAVE. IT'S LIKE MOST CIVIL
14 DOCKETS. IT TAKES A GREAT DEAL OF TIME. AND THIS HASN'T BEEN
15 BRIEFED, YOUR HONOR. I WAS TRYING TO THINK OF WHETHER TO
16 QUOTE MUHAMMAD ALI OR NOT, BUT I'LL SPARE THE COURT THAT.

17 THE CASE DUBBS V. CENTRAL INTELLIGENCE AGENCY, 866 F
18 2D, 1114, 9TH CIRCUIT, 1989, I'LL JUST READ ONE SENTENCE.

19 "THE CIA'S INDIVIDUAL SCI SECURITY CLEARANCE
20 DETERMINATIONS CANNOT BE REVIEWED UNDER APA SECTION 706(2)(A)
21 BECAUSE SUCH DETERMINATIONS ARE, FOR PURPOSES OF
22 SECTION 701(A)(2), COMMITTED TO AGENCY DISCRETION BY LAW."

23 I THINK THE ROAD WE'RE BEING LED DOWN HERE IS "FILE
24 YOUR APA SUIT AND A MOTION TO DISMISS IN RELIANCE ON DUBBS.
25 YOU'RE OUT OF LUCK, MR. FOGGO."

1 THE COURT: LET ME COME BACK TO DOOR 2, WHICH IS YOU
2 HAVE TO MAKE THE REQUEST IN THE FIRST INSTANCE WITH THE
3 PROSECUTORS.

4 WHEN YOU ACKNOWLEDGE THAT YOU'RE GOING TO HAVE TO DO
5 THAT ULTIMATELY, WHAT DO YOU LOSE BY DOING IT SOONER RATHER
6 THAN LATER?

7 MR. MAC DOUGALL: WE LOSE THE ABILITY TO CONTINUE
8 THAT WORK, CONTINUE THE INVESTIGATION UNHAMPERED AND
9 UNINTERRUPTED. WHEN I WAS PROSECUTING CASES, IF YOU FIND OUT
10 THERE'S A PROBLEM WITH A DEFENSE WITNESS, WHAT'S THE FIRST
11 THING YOU DO? YOU CALL THE CASE AGENT, "GO TALK TO HIM. SEE
12 WHAT'S GOING ON. DON'T INTIMIDATE HIM. FIND OUT WHAT'S GOING
13 ON." THAT DAY IS GOING TO COME. AT THIS STAGE WHERE WE'RE
14 TALKING ABOUT SIMPLY BEING PERMITTED TO ASK CLEARED
15 INDIVIDUALS QUESTIONS, IT'S UNNECESSARY. IT DOESN'T IMPLICATE
16 ANY CONSTITUTIONAL ISSUE AT ALL.

17 THE COURT: HERE'S WHAT DISTURBS ME, THOUGH: THE
18 U.S. ATTORNEYS ARE THE LAWYERS FOR THE GOVERNMENT IN THE CASE
19 IN FRONT OF ME. I'M VERY IMPRESSED WITH MR. MCPHERSON. HE'S
20 AN ABLE ADVOCATE. AND I THINK, AS I SAID, FROM LOOKING AT THE
21 CORRESPONDENCE, THAT HE'S A VERY FAIR-MINDED GUY AND THAT HE
22 VERY DILIGENTLY AND PROBABLY CORRECTLY, FROM THE CIA'S POINT
23 OF VIEW, DISCHARGES RESPONSIBILITIES.

24 BUT AT THE END OF THE DAY, HE'S NOT IN A POSITION TO
25 ARGUE TO ME ULTIMATELY WHETHER THIS IS RELEVANT IN THE CONTEXT

1 OF THIS TRIAL. THAT'S THE JOB OF THE U.S. ATTORNEYS. AND I
2 DON'T WANT TO PUT HIM IN THAT POSITION. HE COULD PROBABLY DO
3 IT, BUT IT'S NOT IN HIS JOB DESCRIPTION.

4 THAT'S THE PROBLEM THAT I'M HAVING HERE, BECAUSE I'M
5 PITTING YOU AGAINST HIM TO ARGUE AGAINST RELEVANCY AND THE
6 OTHER FACTORS. ALTHOUGH I THINK IT'S THE CASE THAT IF YOU
7 CONVINCE ME THAT IT'S RELEVANT NO MATTER HOW CLASSIFIED A
8 SECRET IT IS, THAT IT'S TOO BAD, THEY EITHER HAVE TO NOT USE
9 IT, FOREGO USING IT, AND MAKE THAT REPRESENTATION TO YOU THAT
10 THEY'RE NOT GOING TO USE IT OR COME UP WITH SOME WAY TO
11 SANITIZE IT OR APPEAL MY DECISION. I THINK THAT'S CORRECT
12 UNDER CIPA, RIGHT?

13 MR. MAC DOUGALL: I THINK THAT'S RIGHT.

14 IN RESPONSE TO YOUR QUESTION ABOUT WHAT ARE THE
15 ALTERNATIVES, I THINK THERE'S AT LEAST TWO. ONE IS ONCE WE'VE
16 MADE OUR PRESENTATION TO THE COURT -- AND YOU MAY ASK
17 MR. MCPHERSON QUESTIONS -- THE COURT CAN CALL THE GOVERNMENT
18 IN AND SAY, "I HAVE SOME QUESTIONS FOR YOU." AND WE WOULD
19 IMPRESS IT TO THE COURT'S DISCRETION TO ASK THOSE QUESTIONS.
20 EX PARTE NOW, "HERE ARE MY CONCERNS." AND WE WOULD ENTRUST
21 THE COURT WITH THAT INFORMATION AND TO NOT DISCLOSE OR
22 DISCLOSE AS MUCH AS THE COURT FELT WAS NECESSARY. I THINK
23 THAT'S ONE OF THE OPTIONS. --

24 THE SECOND IS THIS CASE, WHEN IT WAS INDICTED, WAS
25 HERALDED BY THE GOVERNMENT AS THE INDICTMENT OF THE

1 HIGHEST-RANKING INTELLIGENCE OFFICIAL IN AMERICAN HISTORY.
2 IT'S AN IMPORTANT CASE. IT'S A VERY IMPORTANT CASE FOR
3 MR. FOGGO AND HIS FAMILY.

4 WITH ALL THE MODESTY OF THE JUSTICE DEPARTMENT
5 THAT'S BROUGHT TO BEAR, IS THERE NO OTHER LAWYER IN THE
6 DEPARTMENT -- AND WITHIN THE CRIMINAL DIVISION OF MAIN JUSTICE
7 THERE ARE MANY WHO COULD BE DESIGNATED. THIS CASE, AS THE
8 COURT SUGGESTED, IS PROBABLY NOT GOING TO GO TO TRIAL IN
9 OCTOBER -- WHO COULD BE DESIGNATED TO PLAY THE INTERMEDIARY
10 ROLE? EVEN ONE IS FINE. WE'RE NOT TRYING TO TIE UP THE
11 GOVERNMENT. WHAT WE'RE TRYING IS DO IS DO OUR JOB BECAUSE WE
12 THINK WE FOUND A SET OF FACTS THAT ARE VERY IMPORTANT.

13 THE COURT: WELL, I LIKE THE SECOND APPROACH, TOO.
14 IN MANY, MANY CONTEXTS, WALLS ARE CREATED, ETHICAL WALLS,
15 WITHIN THE SAME OFFICE. AND IT SEEMS TO ME THAT THIS OBTVIATES
16 THE PROBLEM. THE GOVERNMENT IS STILL REPRESENTED BY THE U.S.
17 ATTORNEY'S OFFICE OF THE DEPARTMENT OF JUSTICE.

18 I DON'T THINK, MR. HALPERN, WITH RESPECT TO YOU AND
19 HOW COMPLICATED THIS CASE IS -- AND I UNDERSTAND THE REAMS OF
20 PAPER INVOLVED. I REMEMBER YOU TELLING ME THAT THERE'S
21 17,000 PAGES THAT GERAGOS WAS GOING TO HAVE TO LOOK AT AND
22 THAT'S WHY IT WAS IMPRACTICAL TO GO FORWARD WITH THE WAIVER OF
23 ENTITLEMENT UNDER CIPA.

24 ALL THAT SAID, I DON'T UNDERSTAND WHY MAYBE NOT ONE
25 OF THE FOUR -- IT'S PRESUMPTUOUS OF ME, I SUPPOSE, TO SUGGEST

1 SOMEBODY TAKE THEMSELVES OUT OF THE TRIAL IN THIS CASE. BUT
2 WHY CAN'T WE GET SOMEONE FROM YOUR APPELLATE DIVISION OR THE
3 DEPARTMENT OF JUSTICE?

4 THEY BROUGHT THIS GUY OUT ON -- WHAT WAS IT,
5 TOMMY K.? NO. THE OTHER CASE, ARELLANO, WHERE I'VE GOT TWO
6 WRITS UP AGAINST ME FOR WANTING TO RELEASE INFORMATION. BUT
7 THEY BROUGHT SOME GUY FROM THE JUSTICE DEPARTMENT, AND HE GOT
8 UP TO SPEED ON THAT REAL QUICK. AND HE'S PURSUING THE APPEAL
9 ON BEHALF OF THE U.S. ATTORNEY'S OFFICE.

10 WHY CAN'T YOU GET SOMEONE FROM THE DEPARTMENT OF
11 JUSTICE TO HANDLE THE DISCOVERY ASPECT OF THIS? AND THEN THAT
12 SOLVES THE REAL PROBLEM THAT THIS CREATES FOR ME. HE DOESN'T
13 GET TO TELL YOU ANYTHING ABOUT THEIR THEORIES OF RELEVANCY.
14 HE COMES IN AND ADVOCATES IN FRONT OF ME. FROM MY
15 PERSPECTIVE, THAT SOLVES BOTH PROBLEMS. IT DOESN'T PUT
16 MR. MCPHERSON IN THE PINCH OF HAVING TO BE GOVERNMENT
17 PROSECUTOR IN THIS CASE. IT PROTECTS FOGGO'S RIGHTS AGAINST
18 DISCLOSURE OF THINGS. THAT PERSON MAY KNOW "DUH, WE'RE GOING
19 TO BE IN FOR HELL IF THIS PERSON TESTIFIES, BUT I CAN'T TELL
20 FORGE AND HALPERN AND CHU ABOUT IT."

21 MR. FORGE: I THINK THE ARELLANO CASE IS A PERFECT
22 EXAMPLE BECAUSE THAT'S A CASE IN WHICH -- YOU'RE RIGHT --
23 SOMEBODY FROM THE DEPARTMENT WAS BOUGHT IN TO WORK ON THE
24 APPEAL AND TO ARGUE THE APPEAL. BUT THAT PERSON WORKS WITH
25 THE PROSECUTORS WITH KNOWLEDGE.

1 IN FACT, MS. DUFFY WENT TO THE ORAL ARGUMENT WITH
2 MR. SCHENKER SO SOMEONE WITH KNOWLEDGE OF THE FACTS OF THE
3 CASE COULD BE THERE TO CONSULT WITH HIM AND TO, IF NECESSARY,
4 ANSWER ANY QUESTIONS THE COURT HAD.

5 I THINK WHAT MR. HALPERN'S POINT WAS -- AND I WOULD
6 EMBRACE IT -- IS THAT I'M NOT SAYING IT'S AN UNREASONABLE
7 REQUEST THEORETICALLY. I JUST THINK PRACTICALLY SPEAKING,
8 WE'RE TALKING ABOUT MONTHS FOR SOMEONE TO GET UP TO SPEED TO
9 THE POINT WHERE THEY CAN REASONABLY PARTICIPATE FULLY IN THE
10 LITIGATION OF THESE ISSUES.

11 THE COURT: IT WOULD ANTICIPATE, MR. FORGE, AT THIS
12 POINT THAT ALL FOUR PROSECUTORS ARE GOING TO TAKE AN ACTIVE
13 ROLE IN THE PRESENTATION OF THE CASE AT TRIAL?

14 MR. FORGE: IT IS. THE TIME OF THE TRIAL MAY ALTER
15 THAT. OBVIOUSLY, WE HAVE OTHER CASES THAT WE'RE ALL WORKING
16 ON, AND THAT MAY CHANGE AT SOME POINT IN TIME. BUT RIGHT NOW,
17 ALL FOUR OF US WILL TAKE AN ACTIVE ROLE IN THE CASE.

18 THE COURT: CALLING WITNESSES OR MAKING OPENING
19 STATEMENTS, CLOSING ARGUMENTS, NOT JUST BEING AT THE TABLE AS
20 FAR AS THE PROSECUTION TEAM ITSELF? YOU ANTICIPATE THAT
21 YOU'RE GOING TO DIVIDE THIS THING UP IN FOUR PARTS?

22 MR. FORGE: THAT'S RIGHT, YOUR HONOR, INCLUDING
23 OPENING STATEMENTS, CLOSING ARGUMENTS, REBUTTAL. THAT IS WHAT
24 IS ANTICIPATED. OBVIOUSLY, SOME OF US WILL TAKE MORE OF THE
25 LABORING OAR IN TERMS OF LITIGATING MOTIONS THAN OTHERS.

1 THAT'S PART OF THE DIVISION. BUT EVERYBODY, IT IS
2 ANTICIPATED, WILL TAKE A VERY ACTIVE ROLE AND HAVING FULL
3 SHARE OF THE WITNESSES IN THIS CASE. I THINK --

4 THE COURT: I'M HAVING TROUBLE. I UNDERSTAND THE
5 ARGUMENT, AND I UNDERSTAND THE COMPLEXITY AND THE NUMBER OF
6 DOCUMENTS. BUT LOOK, I HAVEN'T SEEN THOSE DOCUMENTS EITHER.
7 I'M NOT CONVERSANT WITH THE 17,000 PAGES. WHAT I KNOW IS
8 WHAT'S BEEN FILED IN FRONT OF ME, AND I'VE READ THE
9 INDICTMENT. AND YET I'M GOING TO BE CHARGED WITH MAKING THESE
10 RELEVANCY DETERMINATIONS.

11 WHY CAN'T A SMART LAWYER IN U.S. ATTORNEY'S OFFICE
12 OF THE DEPARTMENT OF JUSTICE SAY, "GIVE ME THE SUMMARY."

13 DID YOU DO A CROSS-MEMO IN THIS CASE BEFORE IT GOT
14 INDICTED?

15 MR. FORGE: YES.

16 THE COURT: "READ OUR CROSS-MEMO, AND WE'LL GIVE YOU
17 SOME UPDATES ON WHERE WE ARE. HERE'S THE INDICTMENT. NOW BE
18 PREPARED TO GO IN AND LISTEN TO MR. MAC DOUGALL'S OFFER OF
19 PROOF ABOUT WHY THIS IS RELEVANT."

20 MR. FORGE: IT'S PRECISELY BECAUSE THE COURT, AS IS
21 ALWAYS THE CASE, HASN'T REVIEWED ALL OF THE INFORMATION. IT'S
22 PRECISELY BECAUSE OF THAT THAT IT'S IMPERATIVE THAT WHOEVER'S
23 ADVOCATING FOR THE GOVERNMENT IS FAMILIAR SO WE CAN POINT OUT
24 TO YOUR HONOR WHERE WE THINK THE DEFENSE ARGUMENT FAILS AND
25 WHERE WE THINK THERE'S CLEAR EVIDENCE AND CLEAR INDICATIONS

1 FROM THE RECORD IN THIS CASE AND THE CHARGES THAT THIS
2 PARTICULAR AREA IS NOT RELEVANT.

3 AGAIN, WE'RE NOT -- NONE OF US ARE DISMISSING OUT OF
4 HAND THIS NOTION OF A TAIN'T TEAM OR HOWEVER YOU WANT TO
5 CHARACTERIZE IT. WE'RE NOT -- I'M NOT THROWING UP A WALL TO
6 IT BY SAYING IT'S GOING TO TAKE TIME. IT WOULD TAKE TIME.
7 THAT DOESN'T MEAN WE DISMISS IT OUT OF HAND. THAT DOESN'T
8 MEAN WE IGNORE THAT POSSIBILITY.

9 I SIMPLY RAISE THAT ISSUE BECAUSE I DON'T WANT THE
10 COURT TO INTERPRET WHAT WE'RE SAYING AS MEANING THIS IS AN
11 EASY OPTION TO GET THIS RESOLVED QUICKLY. I THINK IT'S AN
12 OPTION. IT IS A PRACTICAL OPTION. IT ADDRESSES, FROM WHAT I
13 DISCERN HERE, EVERYBODY'S CONCERNS. IT'S JUST GOING TO TAKE
14 TIME.

15 WE COME BACK TO THE PRACTICAL ASPECT OF THIS THING.
16 YOUR HONOR, AS YOU ALWAYS DO, YOU GET TO THE HEART OF THE
17 MATTER WITH THE QUESTIONS. "MR. MAC DOUGALL, WHAT IS THE
18 PROBLEM? IF YOU'RE ALREADY AWARE OF 90 PERCENT OF THE
19 INFORMATION" -- HIS REPRESENTATIONS -- "IF YOU'VE ALREADY
20 DETERMINED IT'S CRITICAL TO THE DEFENSE" -- HIS
21 REPRESENTATION -- "AND YOU ALREADY CONCEDED THAT YOU'RE
22 PROBABLY GOING TO HAVE TO DISCLOSE THIS TO THE GOVERNMENT DOWN
23 THE LINE IN A SECTION 5 DISCLOSURE," WHAT IS THE DOWNSIDE OF
24 DISCLOSING IT NOW SO WE CAN LITIGATE IT?

25 THE COURT: THE PROBLEM IS HE DOESN'T WANT YOU TO

1 SHORE UP THE WEAKNESSES THAT HE PERCEIVES AND THINKS YOU DON'T
2 PERCEIVE AT THIS POINT. TIMING IS EVERYTHING. MAYBE HE'S GOT
3 SOME STRATEGY ABOUT WHEN HE'S GOING TO MAKE THOSE SECTION 5
4 REQUESTS AND WHEN, IN THE COURSE OF THINGS, IT'S GOING TO
5 COME. MAYBE HE'S GOING TO DO IT CLOSER IN TIME TO THE TRIAL
6 SO HE THINKS THAT YOU WON'T BE ABLE TO SHORE UP THE WEAKNESSES
7 THAT THEY'VE EXPOSED.

8 I DON'T KNOW WHAT HIS THINKING IS, BUT THAT'S A
9 POSSIBILITY. AND THAT'S ONE ANSWER TO WHY IT HURTS HIM TO
10 DISCLOSE IT NOW WHEN ULTIMATELY HE'S GOT TO DISCLOSE IT LATER
11 TO GET THE ACTUAL INFORMATION.

12 MR. FORGE: THE ONE THING THAT I WANT TO BRING UP
13 AND NOBODY'S RAISED YET IS THAT ULTIMATELY LOOKING FROM BOTH
14 SIDES, WE SHOULD BE ENGAGED IN A SEARCH FOR THE TRUTH. WHAT
15 MR. MAC DOUGALL SAID, IF HE REALLY BELIEVES IT, IF HE REALLY
16 BELIEVES THAT THIS INFORMATION WILL ENLIGHTEN US AND WE'LL
17 REALIZE THIS CASE IS UPSIDE-DOWN, FRANKLY, HE HAS AN
18 OBLIGATION TO BRING THAT TO OUR ATTENTION.

19 THE COURT: HE SAYS HE DID AND YOU GUYS WERE
20 INDIFFERENT TO IT. HE SAYS, "I TOLD YOU BEFORE THE CASE GOT
21 INDICTED YOU NEED TO TALK TO THESE PEOPLE. THEY WERE NEVER
22 INTERVIEWED."

23 MR. FORGE: I'M NOT AWARE OF ANY INDIVIDUALS HE
24 IDENTIFIED. WE GET A COMMUNICATION FROM A DEFENSE COUNSEL
25 SAYING, "HEY, I DON'T THINK YOU'VE TALKED TO EVERYBODY. DON'T

1 INDICT NOW," THAT OBVIOUSLY IS NOT SOMETHING WE CAN ADDRESS.
2 I'M NOT AWARE OF ANYBODY THAT MR. MAC DOUGALL HAS IDENTIFIED
3 AS SOMEONE WE NEED TO TALK TO AND THAT WE FAILED TO TALK OR
4 ATTEMPT TO TALK TO THAT PERSON.

5 THE COURT: I WANT TO ASK YOU ONE MORE QUESTION
6 ABOUT THE COMPROMISE PLAN -- THAT'S WHAT I'LL CALL IT --
7 THAT'S BEEN SUGGESTED.

8 IT SEEMS TO ME SOMEBODY READING THE CROSS-MEMO,
9 BEING BRIEFED BY YOU FOLKS BEFORE THEY EVER KNOW WHAT THE
10 REQUEST IS FROM MR. MAC DOUGALL CAN BE UP TO SPEED IN A WEEK
11 ON THIS CASE. NOT CONVERSANT WITH EVERYTHING, BUT KNOW WHAT
12 THE CASE IS ABOUT, KNOW WHAT THE ALLEGATIONS ARE ABOUT.

13 THEN AS THINGS WORK WITH LAWYERS, THAT PERSON IS
14 CHARGED WITH THE OBLIGATION OF MEETING AND INTERFACING WITH
15 MR. MAC DOUGALL. AND MR. MAC DOUGALL SAYS, "I WANT ALL THESE
16 THINGS." I ASSUME THE PERSON WOULD HAVE SOME PRELIMINARY
17 IMPRESSION OF WHETHER THIS IS REALLY RELEVANT.

18 BUT TO THE EXTENT THAT THEY DON'T, THEY CAN GO BACK
19 AND DO SOME RESEARCH FROM THE CASE FILE AND ASK QUESTIONS OF
20 YOU IN THE MANNER THAT HE'S PROPOSED THAT I DO AND SAY,
21 WITHOUT GIVING UP THE GHOST HERE, EXACTLY WHAT HE'S ASKING;
22 "LET ME ASK YOU ABOUT THIS" AND INFORM THEMSELVES. THAT'S THE
23 WAY THIS BUSINESS WORKS. THAT'S HOW WE MAKE JUDGMENTS BASED
24 ON NEW INFORMATION. THAT'S THE STUFF THAT LAWYERS DO.

25 WHY CAN'T THAT WORK AND WHY CAN'T THAT WORK IN

1 FAIRLY SHORT ORDER?

2 MR. FORGE: IT'S THE LATTER PART, YOUR HONOR, WHERE
3 I THINK WE HAVE A SLIGHT DISAGREEMENT. IN SHORT ORDER, FOR
4 ME -- DEFINING "SHORT ORDER" IN THIS CASE, WHICH HAS BEEN
5 INVESTIGATED FOR WELL OVER A YEAR, THEY'VE BEEN ON THE CASE
6 FOR SIX MONTHS, AND THEY'RE JUST NOW BRINGING THIS ISSUE TO
7 THE COURT'S ATTENTION. SHORT ORDER WITH THAT BACK ON THE
8 MIND, THE DISCOVERY IN THIS CASE IS NOT A WEEK. THESE PEOPLE
9 HAVE TO BE CLEARED. THEY HAVE TO BE READ INTO THE RIGHT
10 COMPARTMENTS.

11 THE COURT: THE PROSECUTORS?

12 MR. FORGE: THAT'S RIGHT, WHOEVER WORKS WITH THIS
13 TAINT TEAM.

14 THE COURT: YOU CAN'T PICK SOMEBODY WHO'S ALREADY
15 GOT THE TOP SECRET CLEARANCE? THERE'S A LOT OF PEOPLE AT THE
16 U.S. ATTORNEY'S OFFICE THAT HAVE THIS CLEARANCE.

17 MR. FORGE: FIRST OF ALL, EVEN IF SOMEBODY HAS TOP
18 SECRET CLEARANCE, WHAT THIS ISSUE IS ABOUT, MY UNDERSTANDING
19 IS, WE'RE TALKING ABOUT COMPARTMENT -- SCI CLEARANCE. SO
20 EVEN IF YOU HAVE TOP SECRET CLEARANCE, WHICH I BELIEVE
21 MR. MAC DOUGALL HAS, YOU STILL HAVE TO BE CLEARED -- YOU HAVE
22 TO BE READ INTO -- AND I'M NOT SAYING THAT CAN'T BE DONE.
23 WHAT I'M SAYING, THOUGH, IT'S AN ADDITIONAL HURDLE THAT HAS TO
24 BE CLEARED.

25 ONCE WE LIMIT THE POOL OF PEOPLE WHO ARE EVEN

1 ELIGIBLE FOR THIS AND PEOPLE WHO ALREADY HAVE TOP SECRET
2 CLEARANCE, THEN WE'RE NO LONGER TALKING ABOUT AN ARMY OF
3 ASSISTANT U.S. ATTORNEYS. WE'RE TALKING ABOUT A COUPLE
4 HANDFULS OF PEOPLE.

5 IT'S NOT SO CLEAR THAT SOMEONE IN THAT SELECT GROUP
6 IS GOING TO BE ABLE TO PUT ASIDE EVERYTHING HE OR SHE IS
7 WORKING ON AND CONCENTRATE IN THE NEXT FOUR TO EIGHT WEEKS AND
8 GET UP TO SPEED IN THIS CASE.

9 THE COURT: WE HAVE SOME TIME. LOOK, ONE OF THE
10 OTHER THINGS THAT'S GOING ON, AS THE RECORD SHOULD REFLECT, IS
11 THAT THIS AFTERNOON AT 1:30, I EXPECT MR. IREDALE IS GOING TO
12 SHOW UP AND MAKE A GENERAL APPEARANCE ON BEHALF OF MR. WILKES.
13 HE HAD THE FORMS WITH HIM LAST TIME.

14 THE SECURITY CLEARANCE, MR. LONDERGAN, HOW LONG DO
15 YOU ANTICIPATE FROM EXPERIENCE IT WILL TAKE MR. IREDALE TO BE
16 CLEARED, ASSUMING HE CAN BE CLEARED?

17 MR. LONDERGAN: YOUR HONOR, IT WILL DEPEND ON WHEN
18 THEY'VE COMPLETED THE BACKGROUND INVESTIGATION AND THE FORMS
19 ARRIVE IN WASHINGTON, D.C.

20 THE COURT: LET'S SAY YOU GET THEM NEXT WEEK.

21 MR. LONDERGAN: NEXT WEEK AND THEY'RE COMPLETED
22 PROPERLY, WE WOULD TRY TO GET AN OKAY TO BRIEF -- ASSUMING
23 THAT THERE'S NO QUESTIONABLE INFORMATION, WE'D TRY FOR
24 30 DAYS. THAT MIGHT BE OPTIMISTIC.

25 THE COURT: I'VE GOT THAT PERIOD OF DEAD TIME

1 ANYWAY. IF I EMBRACE WHAT I'M CALLING A COMPROMISE, 30 DAYS,
2 THAT SEEMS LIKE A LOT OF TIME FOR SOMEBODY TO AT LEAST BE
3 PREPARED TO ENTERTAIN REQUESTS AND ACT ON THOSE REQUESTS AND
4 APPEAR IN FRONT OF ME AND SAY "NO, THEY SHOULDN'T GET THIS" OR
5 TELL MR. MCPHERSON "YES, WE THINK THEY SHOULD GET THIS."

6 MR. FORGE: DEPENDING ON THE PERSON'S SCHEDULE AND
7 ASSUMING -- AND THEIR CLEARANCE LEVEL ALREADY, I THINK 30 DAYS
8 IS POSSIBLE. I'M NOT SAYING IT'S DOABLE. YOUR HONOR KNOWS
9 AND MR. MAC DOUGALL KNOWS THERE AREN'T TOO MANY AUSA'S WALKING
10 AROUND OUR OFFICE WHO'VE GOT EMPTY PLATES.

11 AND WHILE IT'S TRUE THAT I CAN'T IMAGINE A CASE IN
12 30 DAYS YOU CAN'T GET A PRETTY FIRM HANDLE ON WHAT'S GOING ON
13 IN THE CASE IF YOU'RE REALLY CONCENTRATING ON THE 30 DAYS,
14 THERE AREN'T A WHOLE LOT OF PEOPLE WHO FIT THE BILL AS
15 SOMEBODY WHO YOU CAN JUST SAY, "PUT EVERYTHING ASIDE FOR THE
16 NEXT 30 DAYS."

17 THE COURT: I DON'T WANT TO TALK OUT OF SCHOOL
18 AGAIN, MR. FORGE, NOR BE PRESUMPTUOUS. BUT YOU'VE GOT
19 SUPERVISORS UP THERE THAT PROBABLY HAVE THE TOP SECRET
20 CLEARANCES WHO COULD SAY, "YOU KNOW, THIS IS VERY LIMITED
21 COLLATERAL DUTY BEYOND MY SUPERVISORIAL RESPONSIBILITIES. ALL
22 I'VE GOT TO DO IS ANSWER ON THE DISCOVERY THINGS AND GO DOWN
23 TO COURT AND ARGUE AGAINST IT IF I OPPOSE IT." YOU'VE GOT A
24 BIG POOL OF SUPERVISORS UP THERE. AGAIN, I'M TALKING OUT OF
25 SCHOOL. IT'S NOT MY BUSINESS HOW YOU ALLOCATE RESOURCES.

1 MR. FORGE: I'M NOT TRYING TO DISCOURAGE THIS
2 COMPROMISE. I'M NOT ARGUING AGAINST IT. I'M JUST ADVOCATING
3 FOR MORE TIME.

4 THE COURT: ARE YOU SATISFIED WITH THAT?

5 MR. MAC DOUGALL: I AM, YOUR HONOR. IF I JUST MAY
6 ADD THAT AT MAIN JUSTICE IN THE CRIMINAL DIVISION, THERE MAY
7 NOT BE AN ARMY, BUT THERE'S A BATTALION OF LAWYERS WHO HAVE
8 TOP SECRET CLEARANCES AS A RESULT OF THE MOUSAWI AND OTHER
9 TERRORIST CASES. I CAN TELL YOU SOME OF THEIR NAMES. I
10 SUSPECT MOST WOULD BE THRILLED TO BE INVOLVED IN THIS CASE.

11 THE COURT: THAT SEEMS TO ME TO BE THE BEST
12 SOLUTION, FRANKLY, IN THE IMMEDIATE CONTEXT OF MR. MAC DOUGALL
13 HERE. IF HE'S IN D.C., THOSE DISCUSSIONS BETWEEN HIM AND
14 SOMEBODY IN THE DEPARTMENT ABOUT THIS CASE COULD PRESUMABLY
15 OCCUR OVER THE PHONE. OR IF THERE'S A DISPUTE, THEY SCHEDULE
16 IT IN FRONT OF ME AND I RESOLVE IT RIGHT AWAY.

17 IT'S A LITTLE UNCONVENTIONAL, MR. FORGE. I
18 UNDERSTAND IT. I HAVE TO TELL YOU THAT IN MY HEART OF HEARTS,
19 I'M VERY, VERY TROUBLED ABOUT THE IDEA OF HIM HAVING TO SHOW
20 HIS HOLD CARDS. I JUST THINK IT PUTS THESE KINDS OF CASES IN
21 A COMPLETELY DIFFERENT CATEGORY WHERE THE DEFENDANT'S
22 DISADVANTAGED WHERE HE WOULD OTHERWISE NOT BE IF THE
23 INFORMATION --

24 MR. FORGE: I KNOW THAT'S BEEN THE CHARACTERIZATION
25 THAT'S BEEN SLAPPED ON THE SITUATION. IT'S NOT A

1 DISADVANTAGE. HE HAS NO CONSTITUTIONAL RIGHTS -- THE TOUHY
2 REGULATIONS ARE ALL WRITTEN REQUIRING THE DEFENDANT TO MAKE A
3 SHOWING. I'M NOT AWARE OF A SINGLE COURT SAYING THAT
4 REQUIRING THAT THE DEFENDANT MAKE A SHOWING OF RELEVANCY OF
5 WITNESSES IS UNCONSTITUTIONAL.

6 THE COURT: I AGREE, BUT I'M TROUBLED BY THAT.

7 YOU'RE NOT TROUBLED AT ALL BY THE IDEA THAT HE HAS
8 TO SAY, "I'VE GOT THE GOODS ON ONE OF YOUR WITNESSES. AND I
9 WANT TO INTERVIEW HIM, AND HERE'S WHAT I WANT TO INTERVIEW HIM
10 ABOUT. HE MADE A STATEMENT THAT'S CONTRARY TO WHAT HE TOLD
11 YOU FELLOWS A YEAR BEFORE."

12 MR. FORGE: I'M NOT TROUBLED BY IT. AND THE REASON
13 IS BECAUSE I TRULY BELIEVE THAT ALL OF US AS OFFICERS OF THE
14 COURT AND AS YOUR HONOR BEING JUDGE -- ALL OF US SHOULD BE
15 INTERESTED IN LEARNING THE TRUTH HERE. AND I THINK ANY
16 OBSTACLES TO THAT -- AND SOME OF THEM ARE NECESSARY. BUT I
17 THINK ANY OBSTACLES THAT ARE ERECTED TO OBTAINING THE TRUTH
18 ARE TO BE AVOIDED. THERE IS NO BETTER REASON FOR THE DEFENSE
19 TO HAVE A RIGHT TO SURPRISE THE GOVERNMENT THAN FOR THE
20 GOVERNMENT TO SURPRISE THE DEFENSE.

21 IF YOU LOOK AT RULE 16, JUST ABOUT EVERY SINGLE
22 PROVISION IN RULE 16 IS RECIPROCAL. I REALIZE THAT MOST
23 DEFENDANTS DON'T COMPLY. WE VERY RARELY GET RECIPROCAL
24 DISCOVERY. BUT IT'S NOT JUST INSANITY DEFENSES. IT'S NOT
25 JUST ALIBI DEFENSES. IT'S EVIDENCE. THEY HAVE TO TELL US.

1 IF THEY WANT TO PUT EVIDENCE IN A TRIAL, THEY HAVE TO TELL US
2 THAT EVIDENCE IN ADVANCE OF TRIAL.

3 THE COURT: WITNESSES?

4 MR. FORGE: WE DON'T HAVE TO GIVE THEM WITNESSES
5 IN ADVANCE OF TRIAL.

6 THE COURT: THEY'VE GOT AN OBLIGATION TO TELL YOU
7 WHO THEIR WITNESSES ARE AND THE SUBSTANCE OF IT IF IT'S NOT
8 RECORDED?

9 MR. FORGE: NO. BUT I'M SAYING WE DON'T HAVE TO.
10 THEY DON'T HAVE TO, AND WE DON'T. WHAT HAPPENS IS THE
11 GOVERNMENT GOES WAY BEYOND, TYPICALLY, AS WE DID IN THIS
12 CASE -- WE GO WAY BEYOND WHAT WE'RE OBLIGATED TO DO
13 STATUTORILY OR EVEN CONSTITUTIONALLY. AND BECAUSE OF THAT, I
14 THINK IT FORMS THE IMPRESSION THAT THERE IS SYSTEMATICALLY SET
15 UP A BIG DISPARITY IN THE TWO-SIDED OBLIGATIONS.

16 THERE REALLY ISN'T THAT GREAT OF A DISPARITY. THERE
17 ARE REQUIREMENTS FOR RECIPROCAL DISCOVERY. AND FRANKLY, I
18 THINK EX PARTE IS THE EXCEPTION, NOT THE RULE, EVEN WHEN IT
19 COMES TO THE DEFENDANT'S DEFENSE. AND THAT'S WHY IT'S WRITTEN
20 INTO SOME STATUTES AND NOT INTO OTHERS.

21 THE COURT: ARE YOU WILLING TO ACCEDE TO THIS
22 PROPOSAL THAT I'VE MADE TO BRING SOMEBODY ELSE ONBOARD TO BE
23 THE CONTACT PERSON? NOT JUST FOR MR. MAC DOUGALL, BECAUSE YOU
24 CAN ANTICIPATE MR. IREDALE'S GOING TO WANT TO DO THE SAME
25 THING. THE OCTOBER TRIAL DATE SETTING WAS OPTIMISTIC NOW IN

1 RETROSPECT.

2 MR. FORGE: THEORETICALLY, IF YOU'RE TALKING
3 ABOUT -- IT ENDS, OBVIOUSLY, AT THE POINT -- WE'RE NOT IN ANY
4 WAY ACCEDING TO WHEN IT COMES TO SECTION 5 NOTICE OR ANYTHING
5 ONCE WE --

6 THE COURT: THAT'S UNDERSTOOD, THAT THAT WILL BE --
7 I WON'T JUST BE DEALING WITH A DISCOVERY DESIGNEE AT THAT
8 POINT.

9 MR. MAC DOUGALL: ABSOLUTELY. OUR AIM SOLELY IS TO
10 CORRECT OUR WORK PRODUCT AT THIS STAGE. THAT'S ALL WE'RE
11 ASKING FOR.

12 MR. FORGE: IF YOU'RE BASICALLY TALKING, YOUR HONOR,
13 ABOUT SOMEBODY TO STAND IN SIDE BY SIDE WITH CIA'S GENERAL
14 COUNSEL ON THESE TOUHY-RELATED ISSUES --

15 THE COURT: AND SIDE BY SIDE WITH YOU, BUT
16 WITHOUT TELLING YOU WHAT MR. MCPHERSON IS SAYING OR WHAT
17 MR. MAC DOUGALL IS SAYING AND WHAT THEY'RE THINKING ABOUT THE
18 RELEVANCE. AND THAT PERSON, IN THE EVENT OF A DISPUTE, WOULD
19 BE THE SOLE REPRESENTATIVE OF THE UNITED STATES THAT CAME
20 TO -- ALTHOUGH I GUESS THOSE WOULD BE EX PARTE PROCEEDINGS,
21 TOO; RIGHT? THOSE WOULD BE IN CAMERA TYPE PROCEEDINGS IF
22 THERE WAS A DISPUTE ABOUT RELEVANCY BECAUSE IT'S IMPLICATING
23 CLASSIFIED INFORMATION. SO THERE WOULD BE NO GENERAL PUBLIC
24 RIGHT TO BE PRESENT AND HEAR THE ARGUMENT OVER THAT.

25 MR. MAC DOUGALL: IT WOULD BE IN CAMERA. I DON'T

1 THINK IT WOULD BE EX PARTE.

2 THE COURT: THAT'S WHAT I'M INCLINED TO DO.

3 THAT'S ACCEPTABLE TO YOU ON BEHALF OF MR. FOGGO?

4 IT'S GOING TO TAKE A LITTLE WHILE, BUT NOT UNDULY LONG IN
5 LIGHT OF THE FACT THAT YOU DON'T HAVE A LAWYER --

6 MR. MAC DOUGALL: WE'LL ALWAYS ACCEPT THE COURT'S
7 RULINGS. BUT THE ONE ISSUE I RAISES -- AND I DON'T KNOW IF
8 TIME WILL PERMIT IT -- AT SOME EXPENSE TO MR. LONDERGAN, WE DO
9 HAVE OUR MATERIAL HERE TO MAKE OUR PROFFER. WE'D VERY MUCH
10 LIKE TO DO THAT.

11 MR. HALPERN: NUMBER ONE, WE WOULD ABSOLUTELY OBJECT
12 TO THAT BECAUSE NOW IT'S BEING DONE WITHOUT THE GOVERNMENT
13 AGAIN. THAT'S EXACTLY OUR POINT.

14 THE COURT: MR. LONDERGAN HANDED IT TO ME,
15 MR. MAC DOUGALL, BEFOREHAND. YOU SAID THAT YOU WOULD DEVISE A
16 WAY WHERE YOU COULD REFER TO PAGES SO THERE WOULD BE NOTHING
17 ON A PUBLIC RECORD.

18 BUT IF WE'RE EMBRACING THIS PLAN WHERE WE'RE GOING
19 TO HAVE A UNITED STATES ATTORNEY OR A JUSTICE DEPARTMENT
20 REPRESENTATIVE HERE, I THINK THAT THE APPROPRIATE TIME TO DO
21 IT IS WHEN THAT PERSON IS UP TO SPEED.

22 MR. MAC DOUGALL: IF I MAY, THE ONLY POINT I WOULD
23 RAISE WITH THAT IS IN MAKING AN EX PARTE PROFFER JUST AS WHEN
24 THE GOVERNMENT HAS MADE THEIRS IN THIS CASE, I THINK WE WOULD
25 FEEL FREE TO EXERCISE A GREAT DEAL OF CANDOR WITH THE COURT,

1 WHICH WE MIGHT NOT DO IN AN CAMERA PROCEEDING WITH THE OTHER
2 SIDE THERE.

3 AS MR. FORGE SAID SEVERAL TIMES, A SEARCH FOR THE
4 TRUTH. AND THE COURT IS IN THE LEAD ON THAT. I DON'T KNOW
5 WHAT HARM THERE WOULD BE IN MAKING THIS INFORMATION AND OUR
6 WORK PRODUCT AVAILABLE TO THE COURT TO INFORM THE COURT'S
7 THINKING.

8 THE COURT: DO YOU HAVE ANY OBJECTION, MR. HALPERN,
9 TO ME AT LEAST CONSIDERING THAT? I WON'T MAKE ANY RULING
10 UNTIL I'VE HEARD FROM THE UNITED STATES. BUT THEY'VE GOT IT
11 HERE. I CAN LOOK AT IT. I CAN BE PREPARED TO COME WHEN YOU
12 SAY, "HERE'S OUR DESIGNEE."

13 MR. HALPERN: NUMBER ONE, LET ME JUST SAY JUMPING
14 BACK AND EMBRACING THE COURT'S SUGGESTION, I WANT MY RESPONSE
15 TO BE MEASURED BECAUSE IT'S DIFFICULT WHEN THE COURT MAKES
16 WHAT APPEARS TO BE PRACTICAL SUGGESTIONS. I, AS A PROSECUTOR,
17 NEVER WANT TO GET UP HERE AND MAKE A STATEMENT THAT MAKES ME
18 LOOK UNREASONABLE OR IMPRACTICAL OR TAKING A POSITION JUST FOR
19 REASONS UNRELATED TO FAIRNESS.

20 AS MR. FORGE MORE ELOQUENTLY THAN I MADE CLEAR, THIS
21 IS ABOUT JUSTICE. WE TAKE THIS VERY SERIOUSLY. I DON'T
22 BELIEVE I'VE EVER BEEN IN FRONT OF THIS COURT MAKING ARGUMENTS
23 THAT ARE NOT SUPPORTED OR THE COURT DOESN'T AT LEAST
24 UNDERSTAND WHY I'M DOING IT. IT'S NOT JUST FOR A POINT.
25 WHETHER IT'S ON A SENTENCE OR ANYTHING, I DON'T GET UP IN

1 COURT AND ARGUE FOR THE MAXIMUM JUST BECAUSE I THINK THAT'S
2 WHAT I NEED TO DO.

3 I'M CONCERNED ABOUT THE PRACTICALITY. I WANT THE
4 COURT TO THINK ABOUT THIS.

5 NUMBER ONE, WE HAVE SOMEBODY ELSE TO COME IN HERE.
6 AND LET'S SAY WE GET SOMEBODY FROM DOJ. DOJ IS WILLING TO DO
7 THAT. HE COMES OUT HERE. HE STARTS LOOKING THROUGH ALL THE
8 DISCOVERY. HE GETS TO THE POINT. I HAVE NO DOUBT ONCE HE'S
9 UP TO SPEED, AN ISSUE'S GOING TO COME UP. HE'S GOING TO COME
10 TO US, AND HE'S GOING TO START TALKING ABOUT AREAS. AND THE
11 MINUTE HE DOES THAT, "WELL, HERE'S THE AREAS. WHAT'S THE
12 QUESTION ABOUT THIS? I NEED TO KNOW MORE INFORMATION ON,"
13 LET'S JUST SAY, "THE ALLIGATOR LIZARD PROGRAM. WHAT ABOUT
14 THAT?" WE'RE GOING TO KNOW THE GENERAL AREA. IF THAT'S NOT
15 TIPPING US OFF, WHY DOESN'T MR. MAC DOUGALL JUST TELL US THAT?

16 THE COURT: THERE'S A WAY THAT THAT CAN BE DONE,
17 MR. HALPERN, YOU AND I BOTH KNOW, WHERE IT WOULDN'T BE THE
18 KIND OF SPECIFIC SHOWING THAT MR. MAC DOUGALL HAS TO MAKE TO
19 CONVINCE ME THAT HE'S ENTITLED TO THE INFORMATION AND THERE'S
20 RELEVANCE. SOMEBODY CAN ASK GENERALIZED QUESTIONS OF YOU AND
21 INFORM THEMSELVES OR SAY, "HOW DO I INFORM MYSELF? SHOW ME
22 THE DOCUMENTS THAT WILL GIVE ME MORE INFORMATION ON THIS."
23 THERE IS A WAY TO DO IT CONSISTENT WITH WHAT WE'VE DISCUSSED
24 HERE.

25 MR. FORGE: MAY I MAKE ANOTHER PROPOSAL FOR POSSIBLE

1 COMPROMISE?

2 SO FAR MR. MAC DOUGALL HAS THE MAIN ISSUE HE WANTS
3 IS ACCESS TO THESE WITNESSES BEFORE WE GET ACCESS TO THEM TO
4 REHABILITATE THEM OR TO INTERVIEW THEM. HE'S GENEROUSLY
5 ACKNOWLEDGING "WE'RE NOT GOING TO TRY TO INTIMIDATE THEM."

6 WHAT I WOULD SUGGEST IS THIS: THIS DISPUTE IS OVER
7 A PROGRAM, NOT OVER WITNESSES. THE PROGRAM DOES NOT REVEAL
8 WHO THE WITNESSES THEY WANT TO TALK TO WOULD BE. WHY DON'T WE
9 TRY THIS IN TERMS OF A LEGITIMATE DISCOVERY DISPUTE OVER
10 ACCESS TO THIS PROGRAM? DON'T TELL US WHO THE WITNESSES ARE
11 YOU WANT TO TALK TO. DON'T TELL US WHO YOU WANT TO INTERVIEW
12 IF YOU GET THE CLEARANCE -- THE SCI CLEARANCE INTO THAT
13 PROGRAM. LET'S JUST TALK ABOUT THE RELEVANCE OF THAT PROGRAM.

14 THE COURT: TELL ME HOW THAT'S GOING TO WORK,
15 THOUGH. I'VE TRIED TO ENVISION THAT, MR. FORGE. HE SAYS --
16 MR. HALPERN SAID, "ALLIGATOR LIZARD PROGRAM." HE SAYS, "I
17 WANT ACCESS TO THE ALLIGATOR LIZARD PROGRAM."

18 WHAT'S YOUR RESPONSE GOING TO BE, "WHAT DOES THAT
19 HAVE TO DO WITH THIS?"

20 MR. FORGE: OUR RESPONSE WOULD BE "THIS CASE
21 INVOLVES DEER, ELEPHANT, AND LION PROGRAMS. THE ALLIGATOR
22 LIZARD PROGRAM IS COMPLETELY SEPARATE AND HAS NOTHING TO DO
23 WITH THE ALLEGATIONS IN THIS CASE. THERE'S NO OVERLAP
24 WHATSOEVER."

25 THE COURT: THEN THE BALL'S BACK IN HIS COURT TO BE

1 MORE SPECIFIC.

2 MR. FORGE: THE BALL'S BACK IN HIS COURT. AND HE
3 SAYS, "WE WANT TO BE ABLE TO SHOW THAT MR. FOGGO'S IS SO
4 VALUABLE TO THE ALLIGATOR LIZARD. HE WAS DEDICATING 99
5 PERCENT OF HIS TIME TO ALLIGATOR" --

6 THE COURT: THAT'S THE PROBLEM.

7 MR. FORGE: BUT THEY CAN DO THAT WITHOUT IDENTIFYING
8 THE WITNESS.

9 THE COURT: I DON'T THINK THEY CAN. I THINK THAT HE
10 IS REQUIRED TO GET MORE SPECIFIC SO THAT YOU CAN KIND OF
11 CRYSTALLIZE WHY THEY NEED IT. THAT IMPLICATES THE VERY
12 PROBLEM THAT I'M STRUGGLING WITH, WHICH IS HE'S GOT TO TIP HIS
13 HAND IN ORDER TO GET THE INFORMATION.

14 I THINK THE BETTER WAY, MR. FORGE, IS TO HAVE
15 SOMEBODY THAT WILL NOT TELL YOU WHAT THE PROFFERS ARE. "WE'LL
16 STILL ASSOCIATE WITH THE GOVERNMENT. WE'LL STILL COME DOWN
17 AND BE KNOWLEDGEABLE ABOUT YOUR CASE. WE'LL ADVOCATE THAT
18 'JUDGE, THIS IS WRONG. THEY SHOULDN'T HAVE THIS.'" I THINK
19 THAT SOLVES IT.

20 THEN THE ACTUAL TRIAL PROSECUTORS -- THERE'S NO HINT
21 OR SUGGESTION THAT YOU'VE HAD AN ADVANTAGE OR YOU'VE GONE BACK
22 TO WITNESSES TO TRY TO SHORE UP THINGS BASED ON INFORMATION --

23 MR. FORGE: WE'RE ALL TALKING ABOUT TIMING. IT'S A
24 QUESTION OF TIMING FOR MR. MAC DOUGALL BECAUSE HE WANTS TO
25 HAVE SOME TIME, A QUIET PERIOD, TO GAIN ACCESS TO THIS PROGRAM

1 AND GAIN ACCESS TO THESE WITNESSES BEFORE INFORMING US OF WHAT
2 IT IS. WE WANT TIME TO GET A SURROGATE PROSECUTOR UP TO SPEED
3 ON THIS THING.

4 THE COURT: I'LL GIVE YOU 30 DAYS. I THINK THAT'S
5 AN APPROPRIATE PERIOD OF TIME. IREDALE'S CLEARANCE ISN'T
6 GOING TO BE -- IF HE STEPS IN, THAT WON'T BE FINISHED BEFORE
7 THEN. YOU'RE GOING TO FACE THE SAME ISSUES FROM MR. IREDALE.
8 I THINK NECESSARILY SO THAT THE REQUESTS ARE GOING TO HAVE TO
9 BE MADE SEPARATELY. THEY CAN'T GET TOGETHER AND SHARE
10 INFORMATION.

11 MR. FORGE: WHEN YOU SAY 30 DAYS, DOES THAT MEAN
12 THAT THEIR DISCOVERY MOTION WILL BE DUE IN 30 DAYS AND THEN WE
13 WOULD HAVE TWO WEEKS TO RESPOND?

14 THE COURT: YES. I WANT YOU TO GET SOMEBODY UP TO
15 SPEED WITHIN 30 DAYS. I THINK THAT'S CONSISTENT WITH WHAT I
16 NOW ENVISION THE TIMETABLE IS GOING TO BE ON THIS CASE. BUT I
17 THINK THAT WILL SOLVE A LOT OF PROBLEMS AND HELP FLY US
18 THROUGH.

19 THE UNDERSTANDING -- I WANT TO REITERATE,
20 MR. MAC DOUGALL -- IS AT SUCH POINT AFTER ALL THIS PRELIMINARY
21 INVESTIGATION IS DONE, THEN THE PROSECUTION TEAM AND THE
22 PERSON WITH MR. HALPERN, MR. FORGE, MS. CHU, AND MR. BHANDARI,
23 GET TO COME IN DURING THE CIPA, RULE 5, AND RULE 6
24 DETERMINATIONS AND MAKE WHATEVER ARGUMENTS.

25 THEY'RE NOT GOING TO BE RELEGATED TO USING THIS

1 PERSON THAT'S COME IN TO HELP THEM OUT IN THE PRELIMINARY
2 STAGES; RIGHT?

3 MR. MAC DOUGALL: I UNDERSTAND THAT. BUT IF I MAY,
4 WE ARE PREPARED TO MAKE OUR MOTION TOMORROW. WE'RE NOT GOING
5 TO WAIT 30 DAYS. OUR MOTION'S ALREADY ESSENTIALLY MADE WITH
6 THE COURT. WE'D LIKE ACCESS TO THESE PROGRAMS.

7 THE COURT: I'LL TAKE THAT UNDER SUBMISSION. IT
8 SOLVES ANOTHER PROBLEM I HAD IN THE BACK OF MY MIND LAST NIGHT
9 AT 1:00 A.M. WHEN I WAS IN BED READING THIS STUFF, WHICH IS
10 I'M GOING TO MAKE SURE I'VE ACCOUNTED FOR THE SPEEDY TRIAL
11 TIME IN THIS CASE. I DIDN'T DECLARE IT COMPLEX, BUT THAT WILL
12 HELP WITH THE MOTION PENDING. SO YOU MAY FILE THE MOTION. I
13 HAVE THE PAPERWORK HERE.

14 IS THIS YOUR SET OF PAPERWORK, MR. LONDERGAN, OR IS
15 IT FOR ME?

16 MR. LONDERGAN: IT'S FOR YOUR HONOR.

17 THE COURT: AND THESE ARE THE EXHIBITS, I ASSUME,
18 FOR THE MOTION. I'LL HOLD IT. I'LL TAKE IT INTO
19 CONSIDERATION. I'LL WAIT FOR THEIR DESIGNATION WITHIN 30 DAYS
20 OF THE REPRESENTATIVE. AT THAT POINT, THE MOTION CAN BE FILED
21 WITH THAT PERSON. AND WITHIN TWO WEEKS, GIVE ME A RESPONSE,
22 AND WE'LL CONVENE A HEARING AND GET GOING ON THIS.

23 I HATE TO GIVE A 30-DAY SETBACK. THE ADVANTAGE OF
24 THAT, MR. MAC DOUGALL, IS THAT IT OBTVIATES SOME OF THE CONCERN
25 THAT I HAVE AND YOU HAVE ABOUT YOU HAVING TO TIP YOUR HAND TO

1 THE VERY PEOPLE THAT ARE PROSECUTING THIS FELLOW.

2 MR. MAC DOUGALL: IF THE COURT HAS THE TIME TODAY,
3 WE'RE PREPARED TO PUT THAT INFORMATION IN FRONT OF THE COURT?

4 MR. MCPHERSON: I'D LIKE TO POINT OUT THIS IS
5 INFORMATION WE HAVEN'T REVIEWED YET. THE ESSENCE OF AN
6 ADMINISTRATIVE PROCEDURES ACT PROCEEDING IS THAT JUDICIAL
7 REVIEW IS CONFINED TO THE RECORD BELOW. NONE OF THIS
8 INFORMATION WAS SUBMITTED TO THE CIA AT THE TIME THE REQUEST
9 WAS MADE.

10 THE COURT: HE'S CHOSEN GATE 2, THOUGH,
11 MR. MCPHERSON. WE'RE AGREED THAT THIS IS GOING TO BE MADE IN
12 THE CONTEXT OF A RULE 16 REQUEST. I'M NOT EVEN CONSIDERING
13 THIS AS AN ADMINISTRATIVE PROCEDURES ACT. THIS IS BEING MADE
14 TO ME. I'M GOING TO GIVE THE GOVERNMENT, THROUGH THE PERSON
15 DESIGNATED BY THE U.S. ATTORNEY, AN OPPORTUNITY TO REVIEW THE
16 MOTION, CONSULT WITH YOU, AND THEN RESPOND. AND THEN I'LL
17 MAKE A DECISION.

18 I THINK WHAT MR. MAC DOUGALL IS SUGGESTING IS "LOOK,
19 I'M OUT HERE TODAY. WE'RE PRO BONO ON THIS CASE. I DON'T
20 WANT TO MAKE ANOTHER TRIP OUT HERE JUST TO MAKE A PROFFER. I
21 CAN'T DO IT OVER THE PHONE BECAUSE OF THE NATURE OF THE
22 INFORMATION. SO IT MAKES SENSE FOR ME TO TELL YOU WHY WE WANT
23 IT NOW."

24 MR. FORGE: THE SUBMISSION OF THE DOCUMENTS, IF I'M
25 UNDERSTANDING YOUR HONOR CORRECTLY, IS GOING TO BE SHARED WITH

1 CIA AND WITH THE DESIGNATED DOJ ULTIMATELY. THERE IS
2 NOTHING -- THERE IS NO -- NOTHING PROPER ABOUT MR. MAC DOUGALL
3 MEETING WITH THE COURT EX PARTE IN CAMERA ON THIS ISSUE. THIS
4 IS GOING TO BE ARGUED. IT'S LIKE A PRE-ARGUMENT.

5 THE COURT: I'M CONCERNED ABOUT THAT. YOU'RE RIGHT,
6 MR. MAC DOUGALL, THAT THEY CAME DOWN TO GIVE ME SOME CONTEXT
7 ON WHY -- I'VE BEEN DOWN THE WRONG PATH ON MY OWN ACCORD A
8 COUPLE OF TIMES. ONE WAS THE IDEA AT FIRST WITH MR. WILKES
9 THAT SOMEHOW WE COULD WAIVE THE CIPA THING AND WHISTLE PAST
10 THE GRAVEYARD. IT BECAME CLEAR TO ME AFTER I HAD GREATER
11 CONTEXT THAT THAT WASN'T GOING TO WORK.

12 I'M GENERALLY CONCERNED ABOUT EX PARTE PROCEEDINGS
13 BECAUSE IT TOTALLY OBLITERATES THE FAIR TRIAL RIGHTS OF ONE
14 SIDE OR THE OTHER. AND THAT APPLIES TO YOU AND YOUR CLIENT AS
15 WELL AS TO THE UNITED STATES. I THINK THEIR DESIGNATED
16 PROSECUTOR OUGHT TO BE HERE TO HEAR THE -- OR MAYBE WE'LL MEET
17 YOU HALFWAY OR GO SOMEWHERE TO HEAR IT. BUT I THINK THAT
18 PERSON OUGHT TO BE A PARTY TO THE PROFFER.

19 BECAUSE THE PROFFER INFORMS THE LEGAL ISSUE; RIGHT?
20 THE PROFFER IS GOING TO BE WHY THIS IS RELEVANT, WHY WE NEED
21 TO HAVE THIS.

22 MR. MAC DOUGALL: WELL, WE HAD ANTICIPATED
23 MR. MCPHERSON BE PRESENT FOR THIS. THIS WAS NOT INTENDED TO
24 BE --

25 THE COURT: SEE, THE PROBLEM THAT THEY HAVE IS THAT

1 MR. MCPHERSON IS NOT A REPRESENTATIVE OF THE UNITED STATES IN
2 THIS CASE. THEY WANT A REPRESENTATIVE OF THE UNITED STATES IN
3 THIS CASE BECAUSE NOW WE'RE OPERATING UNDER THE AUSPICES OF
4 RULE 16 AND NOT THE ADMINISTRATIVE PROCEDURES ACT. NONE OF US
5 WANTS THAT. I THINK PROBABLY I SHOULD WAIT.

6 DO YOU ANTICIPATE THAT YOU'LL BE OUT HERE AGAIN?

7 MR. MAC DOUGALL: I WILL, YOUR HONOR. PRIOR -- I
8 WASN'T GOING TO BACK TO THIS. MR. HALPERN MADE A REFERENCE TO
9 THE S.C.I.F. FOR SALE ON GOOGLE. WHAT HE DIDN'T TELL YOU IS
10 IT'S \$100,000 A MONTH. AND MR. FOGGO, OUR CLIENT, CAN'T
11 AFFORD TO COME TO HIS HEARINGS.

12 THE COURT: LET ME DIGRESS FOR JUST A MINUTE.

13 MR. LONDERGAN, DO YOU HAVE ANYTHING NEW ON THAT
14 FRONT?

15 MR. HALPERN: I CAN PROBABLY --

16 THE COURT: YOU'LL PAY FOR THE S.C.I.F.?

17 MR. HALPERN: ABSOLUTELY. I'LL SPEAK TO THE
18 ATTORNEY GENERAL ABOUT IT.

19 THE COURT: YOU MAKE MORE THAN 100,000 A YEAR.

20 MR. HALPERN: AFTER TAXES, I THINK MAYBE I'M OUT OF
21 LUCK.

22 THE LATEST IS THIS: THE PEOPLE WITH GSA ARE
23 PREPARED TO BUILD A S.C.I.F. IT WILL TAKE NO MORE THAN TWO
24 WEEKS.

25 THE COURT: HERE.

1 MR. HALPERN: HERE.

2 THE BIG PROBLEM IS THE LEAD TIME ON THE DOOR -- AND
3 I DON'T WANT TO GO INTO ALL THE DETAILS. THERE'S SOME OTHER
4 LONG DETAILS THAT ARE A PROBLEM. THEY'RE TRYING TO WORK ON
5 IT. THEY BELIEVE IT WILL BE EIGHT WEEKS. MAYBE IT CAN BE A
6 LITTLE SHORTER.

7 THE COURT: GET THEM DOWN TO 30 DAYS.

8 WHAT CAN YOU DO TO HELP HIM IN THE FIRST INSTANCE,
9 THOUGH? BECAUSE HE NEEDS S.C.I.F. SPACE AVAILABLE ON
10 EVENINGS AND WEEKENDS IN D.C. DO YOU HAVE ANY STROKE THERE,
11 MR. HALPERN?

12 MR. HALPERN: MR. LONDERGAN HAS FAR MORE THAN I DO.
13 HE'S BACK THERE, AND HE CAN'T GET IT ACCOMPLISHED. I KNOW A
14 LOT OF PEOPLE IN THE DEPARTMENT, BUT NOT WHO HAVE S.C.I.F.'S
15 IN THEIR BACKYARD.

16 THE COURT: I CALLED -- I THINK I'VE TOLD YOU THIS,
17 MR. MAC DOUGALL. I CALLED THE CHIEF JUDGE IN THE EASTERN
18 DISTRICT OF VIRGINIA. HE REFERRED ME TO JUDGE LEONIE
19 BRINKEMA. SHE UNDERTOOK TO LOOK IN THE AREA AND SAID, "NO,
20 THERE'S ABSOLUTELY NOTHING."

21 BUT AGAIN, MAYBE I'M TOO PRACTICAL FOR MY OWN GOOD.
22 OTHER THAN COMPONENTS OF THE JUSTICE DEPARTMENT, FOR EXAMPLE,
23 THE CIA, THERE'S GOT TO BE OTHER S.C.I.F.'S AVAILABLE THAT
24 AREN'T IN USE.

25 DOESN'T THE DEPARTMENT OF DEFENSE, FOR EXAMPLE, HAVE

1 ONE? YOU HAVE ALL KINDS OF CONTACTS WITH THOSE AGENCIES. NOT
2 YOU PERSONALLY, BUT YOUR OFFICE DOES. THEY DEFEND THEM HERE.
3 CAN'T SOMEBODY MAKE THE CALL AND SAY, "DO YOU HAVE ONE
4 COLLECTING DUST? WE NEED S.C.I.F. AVAILABILITY. THESE FOLKS
5 ARE CLEARED. THEY'LL SIGN IN."

6 MR. HALPERN: I'M HAPPY TO DO THAT. IT'S JUST I'M
7 TELLING YOU THIS IS NOT SOMETHING -- THE REASON WHY THE
8 S.C.I.F. SPACE IS \$100,000 A MONTH -- AND FRANKLY, I BELIEVE
9 MAYBE I COULD RECOMMEND A GOOD REAL ESTATE AGENT. IF THEY
10 DON'T NEED IT FULL TIME, THE PRICE WOULD GO DOWN. BUT THE
11 REASON THE PRICE IS HIGH HAS TO DO WITH THEIR LACK OF
12 AVAILABILITY. I'M AWARE OF TWO S.C.I.F.'S THAT WE HAVE ACCESS
13 TO HERE: ONE AT THE FBI, AND ONE IN OUR OFFICE. IT'S BEING
14 USED ALMOST FULL TIME.

15 THE COURT: YOU DON'T THINK WITH ALL THE MILITARY
16 INSTALLATIONS HERE, THERE'S NOT A S.C.I.F. AT ONE OF THOSE?

17 MR. HALPERN: I HAVE NO DOUBT, BUT I WOULD DOUBT
18 VERY HIGHLY THAT IT WOULD BE FREE. I KNOW INDIVIDUALS WHO
19 WORK IN S.C.I.F.'S. MOST OF THE DEFENSE CONTRACTORS, THEY
20 HAVE S.C.I.F.'S THAT ARE SPACES. THEY MAY BE LABORATORIES.
21 THEY MAY BE OFFICES WITH NUMEROUS PEOPLE IN THEM. IT'S NOT
22 LIKE THERE'S ONE ROOM THAT'S SET ASIDE THAT WILL HAVE THIS
23 S.C.I.F.

24 THE COURT: MR. HALPERN, WILL YOU MAKE SOME CALLS?
25 CALL MR. STAHL AT THE CIVIL DIVISION AND ASK HIM TO MAKE SOME

1 INQUIRIES WITH THESE OTHER AGENCIES.

2 AS FAR AS I'M CONCERNED, MR. MCPHERSON, UNLESS I'M
3 WRONG, AS LONG AS IT'S AN APPROVED S.C.I.F., IT DOESN'T HAVE
4 TO BE ONE THAT'S ASSOCIATED NECESSARILY WITH THE DEPARTMENT OF
5 JUSTICE OR THE CRIMINAL JUSTICE SYSTEM AT ALL. IT COULD BE,
6 FOR EXAMPLE, ONE ASSOCIATED WITH DEFENSE AND USED FOR THE
7 PURPOSE OF THIS CASE IF IT'S CONVENIENT.

8 AM I WRONG ABOUT THAT?

9 MR. MCPHERSON: THAT'S CORRECT. IT MUST MEET THE
10 APPROVAL OF MR. LONDERGAN'S OFFICE.

11 THE COURT: MR. LONDERGAN, I'M NOT TRYING TO PUT YOU
12 OUT OF BUSINESS. I KNOW YOU'RE ON TOP OF THIS. BUT MAYBE,
13 JUST MAYBE, IF MR. STAHL, FOR EXAMPLE, WHO IS THE HEAD OF
14 THEIR CIVIL DIVISION, CALLS IN A FAVOR TO SOMEBODY AND THEY
15 MAKE A COUPLE OF CALLS, MAYBE WE CAN GET SOME MOVEMENT WHERE
16 OTHERWISE YOU'VE BEEN TOLD NO BEFORE.

17 MR. LONDERGAN: WE'RE TALKING ABOUT IN SAN DIEGO?

18 THE COURT: NO. I'M TALKING ABOUT SOMEWHERE IN D.C.
19 YOU'VE BEEN VERY GRACIOUS UP TO THIS POINT TO MAKE YOUR
20 OFFICES AVAILABLE. I'M SURE MR. MAC DOUGALL APPRECIATES IT.
21 HE'S SAID THAT MANY TIMES.

22 THE PROBLEM IS THAT THEY'RE NOT AVAILABLE ON THE
23 EVENINGS AND WEEKENDS WHEN THEY WANT TO WORK. AS IT GETS
24 CLOSER TO CRUNCH TIME ON THIS CASE AND THE SECTION 5,
25 SECTION 6 REQUESTS COME IN, I'M SURE THAT THEY'RE GOING TO

1 WANT MORE TIME THAN IS PROBABLY AVAILABLE AND MORE TIME THAT
2 WOULD BE CONVENIENT FOR THEM. THEY'RE PRO BONO ON THIS CASE.
3 I'M SURE THEY'RE HANDLING OTHER MATTERS IN THEIR PRIVATE
4 PRACTICE DURING THE DAY. THEY TURN TO THIS IN THE EVENINGS OR
5 ON THE WEEKENDS, THAT TYPE OF THING. I'M GOING TO TRY TO
6 ACCOMMODATE THAT SCHEDULE, TO THE EXTENT I CAN.

7 MR. LONDERGAN: YOUR HONOR, MY UNDERSTANDING IS THAT
8 THE DEFENSE TEAM NEEDS A DEDICATED 24/7 FACILITY. AND
9 "DEDICATED" WOULD MEAN DEDICATED IN ITS ENTIRETY FOR THE FOGGO
10 DEFENSE TEAM.

11 THE COURT: IS THAT WHAT IT IS?

12 MR. MAC DOUGALL: NOT NECESSARILY. I DON'T MEAN TO
13 QUARREL WITH MR. LONDERGAN. WE'RE HAPPY TO SHARE SPACE,
14 CERTAINLY. THE DIFFICULTY WITH MR. LONDERGAN'S S.C.I.F. IS
15 SOMETIMES IT'S BOOKED FOR TWO WEEKS AT A TIME AND WE'RE OUT OF
16 LUCK. IT'S NOT DEDICATED IN A SENSE THAT NO ONE ELSE CAN USE
17 IT. IT WOULD JUST BE DEDICATED IN A SENSE THAT WE WOULD HAVE
18 ACCESS TO IT AS WE NEEDED IT. AND IF WE HAVE TO COLLABORATE
19 WITH SOME OTHER GROUP OF LAWYERS, WE'LL DO THAT. IT'S
20 CERTAINLY BETTER THAN WE HAVE NOW.

21 MR. LONDERGAN: YOUR HONOR, THE SECOND POINT IN
22 TERMS OF LOCATION OR THE OWNERSHIP OF THAT PARTICULAR
23 FACILITY, THERE'S ONE PARTICULAR AGENCY WHO HAS THE
24 PREPONDERANCE OR ALL OF THE CLASSIFIED INFORMATION. AS LONG
25 AS THERE'S NO OBJECTION BY THAT PARTICULAR AGENCY FOR USING AN

1 ACCREDITED S.C.I.F. IN SOME OTHER PART OF THE GOVERNMENT, THEN
2 IT WOULD BE NO ISSUE TO US.

3 THE COURT: THAT'S WHY I PUT THE QUESTION TO
4 MR. MCPHERSON.

5 YOU SAY IF MR. LONDERGAN SIGNS OFF ON IT AS AN
6 ACCREDITED S.C.I.F., YOU WOULDN'T OBJECT?

7 MR. MCPHERSON: FOR THE LEVEL OF INFORMATION. THAT
8 WOULD BE DETERMINED BY WHAT THE COURT RULES ABOUT THESE
9 PROGRAMS.

10 THE COURT: THE GIST OF THIS, MR. HALPERN, IS IF YOU
11 CAN LEND A HAND, I WANT TO TRY TO ACCOMMODATE MR. FOGGO'S
12 COUNSEL IN THIS CASE, GET THEM A PLACE WHERE THEY CAN WORK AT
13 IRREGULAR TIMES. AND THEY'RE COMPETING. MR. LONDERGAN'S DONE
14 HIS BEST TO PULL THE BALANCE THROUGH BETWEEN ALL THE PEOPLE
15 THAT WANT ACCESS TO THAT THING. AS MR. MAC DOUGALL POINTS OUT
16 AND HAS POINTED OUT TO ME, SOMETIMES THAT INVOLVES OR
17 NECESSITATES A TWO-WEEK WAIT TO EVEN GET IN. IF YOU CAN HELP
18 WITH THAT --

19 MR. HALPERN: I'LL MAKE A CALL TO THE NATIONAL
20 SECURITY PEOPLE THERE. I DO THINK THAT WE SHOULD MOVE FORWARD
21 QUICKLY IN SAN DIEGO ON THE FUNDING SO BY THE END OF OCTOBER,
22 WHICH IS NOT THAT FAR AWAY, WE HAVE A S.C.I.F. HERE FULL
23 TIME.

24 THE COURT: I AGREE. BECAUSE IF IT IS, MR. IREDALE
25 IS GOING TO BE HONKING TO GET INTO THE S.C.I.F. AND USE IT.

1 MR. MAC DOUGALL, I THINK MY ANSWER ON THE OTHER
2 THING IS I'LL HOLD OFF ON THE PROFFER. I THINK THAT A
3 GOVERNMENT REPRESENTATIVE HAS A RIGHT TO HEAR THAT PROFFER,
4 TOO, AND KNOW WHAT IT IS BEFORE IT'S MADE IN THE EX PARTE. IT
5 IS, AFTER ALL, A RULE 16 TYPE REQUEST. I WANT TO HEAR FROM
6 BOTH SIDES BEFORE I MAKE THE DECISION ON IT. I HAVE THE
7 MATERIAL. I'LL GIVE IT BACK TO MR. LONDERGAN UNTIL THE PERSON
8 COMES. YOU CAN FILE THE MOTION, AS FAR AS I'M CONCERNED.

9 YOU DON'T HAVE ANY OBJECTION TO THAT, HIM FILING THE
10 MOTION AND THEN --

11 MR. HALPERN: OUR ONLY OBJECTION WOULD BE IF HE
12 DOESN'T DO IT APPROPRIATELY. THE GOVERNMENT FILED A MOTION IN
13 THIS CASE. WE FILED IT PUBLICLY.

14 THE COURT: THE NATURE OF THIS IS IT CAN'T BE FILED
15 PUBLICLY.

16 MR. HALPERN: NO, YOUR HONOR. ALL THE LEGAL
17 ARGUMENTS CAN BE FILED PUBLICLY AS WE DID. IF IT'S JUST A
18 DECLARATION SAYING "WE'RE FILING A MOTION. AND OUR
19 PRESENTATION AND OUR DOCUMENTS ARE EX PARTE," THAT'S FINE. IN
20 FACT, I DID ONE VERY RECENTLY, ALSO. IT'S JUST SO THERE'S
21 NOTICE. IT'S ON THE COURT'S CALENDAR. EVERYBODY CAN SEE HE'S
22 FILED A MOTION AND WHAT IT IS.

23 THE COURT: THE GOVERNMENT'S CONCERN FOR THE
24 PUBLIC'S RIGHT TO KNOW IS REFRESHING, ISN'T IT?

25 MR. MAC DOUGALL: IT IS. MR. KONTOGIANNIS WOULD BE

1 THRILLED TO HEAR THAT.

2 MR. HALPERN: YOUR HONOR, WE'VE BEEN EDUCATED BY THE
3 COURT. AND NOW WE'RE BENDING OVER BACKWARDS IN THE WAY I
4 THINK THE COURT WOULD LIKE IT DONE. WITH THAT IN MIND, IT IS
5 TRUE THAT THE GOVERNMENT DID FILE ONE EX PARTE IN THIS CASE.
6 WHEN WE DID IT, WE NOTICED IT. WE FILED IT IN THE DOCUMENT.
7 WE TOLD THEM WE WERE GOING TO DO IT. WE'LL GIVE THEM THE
8 OPPORTUNITY TO DO IT AGAIN.

9 THE COURT: I AGREE WITH WHAT YOU SAID, MR. HALPERN.
10 WE'LL DO THAT FROM NOW ON. THE EXHIBITS THEMSELVES WILL BE
11 SEALED AND PRESENTED TO THE COURT TO PRESERVE CLASSIFIED
12 INFORMATION.

13 MR. MAC DOUGALL: ONE LAST REQUEST, YOUR HONOR, WITH
14 REGARD TO THE S.C.I.F. ISSUE. I DON'T MEAN TO GO AWAY FROM
15 THAT, BUT IT WEIGHS HEAVILY ON OUR MINDS.

16 IN THE INDICTMENT, THERE ARE REFERENCES TO A
17 S.C.I.F. HAVING BEEN CONSTRUCTED AT ONE OF THE CONTRACTORS IN
18 CHANTILLY, VIRGINIA, WHICH IS ABOUT 20 MILES FROM WASHINGTON.
19 WE'RE TRYING TO FIND OUT WHERE THAT S.C.I.F. IS AND WHO
20 CONTROLS IT NOW BECAUSE WE'D BE WILLING TO USE THAT S.C.I.F.
21 EVEN THOUGH IT'S QUITE A DISTANCE. THAT'S SOMETHING THAT THE
22 U.S. ATTORNEY'S OFFICE, I WOULD THINK, WOULD HAVE INTIMATE
23 ACCESS TO. IT WOULD BE VERY HELPFUL.

24 MR. HALPERN: ALL IT WOULD TAKE IS A PHONE CALL.
25 I'M HAPPY TO HELP OUT.

1 THE COURT: MAYBE YOU CAN HAVE ACCESS TO THAT.

2 TO SUM UP AND REITERATE THE DECISIONS THAT I'VE
3 MADE, AT THE PRESENT TIME I DENY THE PENDING MOTION TO COMPEL
4 THE CIA TO ADMIT MR. FOGGO'S LEGAL REPRESENTATIVES INTO THE
5 ADDITIONAL COMPARTMENTS. DENIED WITHOUT PREJUDICE.

6 WITHIN 30 DAYS, HOPEFULLY SOONER, THE GOVERNMENT
7 WILL DESIGNATE A PERSON TO ACT AS THEIR DISCOVERY LEAD PERSON.
8 THE UNDERSTANDING WILL BE THAT THAT PERSON WILL REPRESENT THE
9 UNITED STATES -- THE INTERESTS OF THE UNITED STATES IN THIS
10 CASE WITH RESPECT TO ANY DISCOVERY REQUESTS MADE PRIOR TO THE
11 SECTION 5, SECTION 6 REQUESTS THAT EVERYONE EXPECTS ARE
12 FORTHCOMING.

13 THAT PERSON WILL DEAL WITH PRELIMINARY DISCOVERY
14 REQUESTS SUCH AS THE ONE THAT WAS PRESENTED TO THE COURT
15 TODAY.

16 THAT PERSON WILL BE FORBIDDEN FROM DISCUSSING THE
17 OFFERS OF PROOF OR THE RELEVANCY OFFERED BY THE DEFENSE FOR
18 WHY THEY NEED THAT INFORMATION WITH THE PROSECUTORS ASSIGNED
19 TO THIS CASE, ALTHOUGH THE PERSON WILL BE FREE TO DISCUSS WITH
20 MR. MCPHERSON AND WITH THE PROSECUTORS IN GENERAL THE
21 RELEVANCE AND MORE SPECIFICALLY WITH MR. MCPHERSON WHAT THE
22 PROFFERED RELEVANCE IS.

23 IT WILL BE THAT DESIGNATED PERSON WHO WILL THEN
24 PRESENT THE UNITED STATES IN ANY DISPUTES THAT ARISES WITH
25 RESPECT TO ENTITLEMENT TO DISCOVERY.

1 MR. FORGE: THERE ARE TWO CLARIFICATIONS.

2 FIRST OF ALL, DISCOVERY DISPUTES RELATING TO ACCESS
3 TO WITNESSES; RIGHT?

4 THE COURT: WELL, AND ACCESS TO CLASSIFIED
5 INFORMATION.

6 MR. FORGE: AND SECOND, I THINK IT'S COMPLETELY
7 IMPRACTICAL TO DO THIS IF THAT PERSON DOES NOT HAVE ACCESS TO
8 THE AGENTS. THERE'S ABSOLUTELY NO WAY SOMEONE CAN GET UP TO
9 SPEED --

10 THE COURT: THE PERSON WILL HAVE ACCESS TO THE
11 AGENTS, BUT I WOULD WANT THE DESIGNATED PERSON TO MAINTAIN THE
12 SAME POSTURE WITH RESPECT TO THE AGENTS THAT HE OR SHE IS
13 MAINTAINING WITH RESPECT TO THE ASSIGNED PROSECUTORS IN THE
14 CASE; THAT IS, NOT TO TELL THE AGENTS SPECIFICALLY WHY THEY
15 THINK THEY NEED IT, BUT RATHER TO DISCUSS MATTERS GENERALLY
16 WITH THEM IN ORDER TO INFORM HIMSELF OR HERSELF WHAT THE
17 POSITION THE UNITED STATES SHOULD BE IN EITHER ACQUIESCING OR
18 OPPOSING THE REQUEST FOR DISCOVERY.

19 MR. FORGE: WHAT WE'LL DO IS IF THAT WINDS UP POSING
20 A PRACTICAL PROBLEM, THAT PERSON AND NOT US CAN COME BEFORE
21 YOUR HONOR WITH DEFENSE COUNSEL AND EXPLAIN "LOOK, I NEED TO
22 TALK TO SO-AND-SO."

23 THE COURT: THAT'S WHAT I EXPECT. I'M NOT TRYING TO
24 PREVENT THAT PERSON FROM HAVING ACCESS TO ANY INFORMATION THE
25 DESIGNATED PERSON NEEDS TO HAVE IN ORDER TO FORMULATE WHAT THE

1 POSITION OF THE UNITED STATES IS WITH RESPECT TO DISCOVERY.

2 WHAT I'M TRYING TO ACCOMPLISH HERE IS THAT THROUGH
3 INADVERTENCE THE PROSECUTORS WHO ARE PROSECUTING MR. FOGGO
4 DON'T GET AN ADVANTAGE AS TO WHERE HE'S GOING WITH HIS DEFENSE
5 OR HOLES IN THE GOVERNMENT'S CASE FROM HIS PERSPECTIVE. I
6 THINK THAT CAN BE ACCOMPLISHED BY MAINTAINING A WALL OF
7 SEPARATION BETWEEN WHAT HE'S HEARING FROM MR. MAC DOUGALL AND
8 OTHER REPRESENTATIVES OF MR. FOGGO AND MR. WILKES AND KEEPING
9 THAT SECRET AND UNKNOWN BY THE PROSECUTORS AND THE CASE
10 AGENTS.

11 MR. FORGE: LASTLY, TO THE EXTENT THAT -- I KNOW YOU
12 REFERENCED SECTIONS 5 AND 6 OF CIPA. TO THE EXTENT THAT WE
13 HAVE INFORMATION THAT FALLS -- THAT WE WANT TO MAKE
14 DISCOVERABLE TO THE DEFENSE, THAT WE WANT PROTECTION UNDER
15 SECTION 4. SO IT'S DISCOVERY THAT WE WANT TO GIVE TO THE
16 DEFENSE WITH SUBSTITUTIONS. SO WE'RE ALREADY AWARE OF IT.
17 I'M ASSUMING THAT'S SOMETHING WE CAN HANDLE.

18 THE COURT: I AGREE. THERE'S NO PRIVACY INTEREST
19 THAT I'M AWARE OF THAT'S IMPLICATED BY THAT.

20 MR. MCPHERSON, SOMETHING ELSE?

21 MR. MCPHERSON: YES, YOUR HONOR.

22 I BELIEVE YOU SAID THIS APPLIES NOT JUST TO
23 WITNESSES, BUT DOCUMENTS AS WELL, WHICH WOULD HAVE THE EFFECT
24 OF CUTTING OUT THE PRIMARY PROSECUTION TEAM FROM ANY CIPA
25 SECTION 4 PROCEEDINGS. I THINK THAT'S A PROBLEM.

1 THE COURT: I AGREE. THAT'S A PROBLEM. THAT'S NOT
2 MY INTENTION. BUT THE CONTACT PERSON IN THE FIRST INSTANCE
3 WILL BE THIS DISCOVERY DESIGNEE.

4 MR. MCPHERSON: FOR WITNESSES.

5 THE COURT: FOR WITNESSES.

6 MR. MAC DOUGALL: IT DOES RELATE TO DOCUMENTS THAT
7 MAY BE PROFFERED IN THE COURSE OF IN CAMERA PROCEEDINGS.

8 THE COURT: THAT'S WHAT I WOULD NOT WANT THE PERSON
9 TO SHARE. IF IT'S MADE IN THE COURSE OF A PROFFER BY
10 MR. MAC DOUGALL, I DON'T WANT THE PROSECUTOR TO GO BACK AND
11 WHISPER IN MR. FORGE'S EAR "TAKE A CLOSE LOOK AT THESE THINGS.
12 THE DEFENSE IS ONTO SOMETHING."

13 MR. MCPHERSON: ANY DOCUMENT WHICH HAS ALREADY BEEN
14 PRODUCED TO THE DEFENSE, OUR UNDERSTANDING IS THE SAME. THAT
15 WOULD NOT BE CONVEYED BACK TO THE MAIN PROSECUTION TEAM. IF
16 THEIR DOCUMENT DEMAND HAS THE EFFECT OF REQUESTING ADDITIONAL
17 DOCUMENTS FROM THE GOVERNMENT, IT'S ENTIRELY PROPER FOR THE
18 MAIN PROSECUTION TEAM TO BE INVOLVED.

19 THE COURT: I AGREE.

20 NOW, WHAT I WANT IS THE TWO PARTIES, GOVERNMENT AND
21 COUNSEL FOR MR. FOGGO, TO DRAFT AN APPROPRIATE ORDER THAT
22 MIMICS THE AGREEMENTS AND THE RULINGS THAT I'VE MADE FROM THE
23 BENCH TODAY SO WE HAVE A WRITTEN ORDER. I WANT TO HAVE A
24 WRITTEN ORDER SO THAT THERE'S NO DISPUTE ABOUT WHAT WAS SAID.
25 WE DON'T HAVE TO RESORT TO THE TRANSCRIPT OR PARSING THE

1 TRANSCRIPT.

2 SO IF YOU WOULD COLLABORATE WITH ONE ANOTHER AND
3 PREPARE A WRITTEN ORDER. AND I EXPECT THAT THAT ORDER WILL
4 ALSO BE IN EFFECT WITH RESPECT TO WHOEVER THE LEGAL
5 REPRESENTATIVES FOR MR. WILKES. WE'LL FOLLOW THE SAME
6 PROCEDURE THERE.

7 ANYTHING ELSE? WE'RE IN RECESS.

8 MR. FORGE: THANK YOU, YOUR HONOR.

9 MR. HALPERN: THANK YOU, YOUR HONOR.

10 --000--

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12

13

14 I HEREBY CERTIFY THAT THE TESTIMONY
15 ADDUCED IN THE FOREGOING MATTER IS
16 A TRUE RECORD OF SAID PROCEEDINGS.

17

18 S/EVA OEMICK 8-22-07

19 EVA OEMICK DATE
20 OFFICIAL COURT REPORTER

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